THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

3A6
Mx North Gallery

UNIVERSITY OF LONDON
LIBRARY

THE
LAW REPORTS
1956

Probate, Divorce, and Admiralty Division

and on Appeal therefrom in the
Court of Appeal
and Decisions in the
Ecclesiastical Courts

BIBL.
LONDIN.
UNIV.

London
HE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES

Published by the Incorporated
Council of Law Reporting for
England and Wales · 3 Stone
Buildings, Lincoln's Inn, London,
W.C.2, and printed by The
Eastern Press, Ltd., London and
Reading

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

MEMBERS OF THE COUNCIL

Chairman—The Hon. Mr. Justice McNair

Vice-Chairman—Sir Leslie Farrer, K.C.V.O.

*

EX-OFFICIO MEMBERS

The Rt. Hon. Sir Reginald Manningham-Buller, Q.C., M.P.
Attorney-General

Sir Harry Hylton-Foster, Q.C., M.P.
Solicitor-General

Sir Edwin Herbert, K.B.E.
President of The Law Society

*

ELECTED MEMBERS

Lincoln's Inn
The Rt. Hon. Lord Justice Jenkins
C. Montgomery White, Esq., Q.C.

Inner Temple
R. E. Burrell, Esq., Q.C.
J. V. Nesbitt, Esq.

Middle Temple
W. Latey, Esq., M.B.E., Q.C.
Montague L. Berryman, Esq., Q.C.

Gray's Inn
The Hon. Mr. Justice McNair
S. E. Pocock, Esq., O.B.E.
* A. G. P. Johnson, Esq.

Appointed on the nomination of the General Council of the Bar
H. Edmund Davies, Esq., Q.C.
R. E. Megarry, Esq., Q.C.

The Law Society
Sir Leslie Farrer, K.C.V.O. (Firm: Messrs. Farrer & Co.)
Kenneth D. Cole, Esq. (Firm: Messrs. Linklaters & Paines)

* Co-opted Member.

*

Secretary—F. G. Hudson, Esq.
Assistant Secretary—F. E. Smith, Esq.
3 Stone Buildings, Lincoln's Inn, W.C.2

EDITORS AND REPORTERS

*

Editor—R. P. Colinvaux, Barrister-at-Law

Assistant Editor—Charles Clayton, Barrister-at-Law

*

REPORTERS

House of Lords	**Privy Council**
F. H. Cowper	Charles Clayton

Court of Appeal No. 1
B. A. Bicknell   E. Dangerfield

Court of Appeal No. 2
A. W. Grant

Court of Appeal No. 3
F. R. Dymond   M. M. Hill

Chancery Division
J. L. Denison   K. R. A. Hart   I. G. R. Moses
J. A. Griffiths

Queen's Bench Division, Court of Criminal Appeal and Courts-Martial Appeal Court
J. D. Pennington   J. F. Lamb   C. J. Ellis
E. M. Wellwood   R. P. Price

Probate and Divorce
J. B. Gardner   E. Jones

Admiralty Division
A. L. G. Stewart-Richardson

Barristers-at-Law

JUDGES OF THE COURT OF APPEAL

1956

Lord Kilmuir, Lord Chancellor

Lord Goddard, Lord Chief Justice of England

Lord Evershed, Master of the Rolls

Lord Merriman	President of the Probate, Divorce, and Admiralty Division
Sir John Edward Singleton	Lords Justices
Sir Alfred Thompson Denning	
Sir David Llewelyn Jenkins	
Sir William Norman Birkett	
Sir Francis Lord Charlton Hodson	
Sir John William Morris	
Sir Charles Robert Ritchie Romer	
Sir Hubert Lister Parker	

JUDGES
OF THE
PROBATE, DIVORCE, AND ADMIRALTY DIVISION
OF
THE HIGH COURT OF JUSTICE
1956

Lord MERRIMAN, President

Sir HUBERT JOSEPH WALLINGTON

Sir HENRY WILLIAM BARNARD

Sir HENRY GORDON WILLMER

Sir CHARLES ARTHUR COLLINGWOOD

Sir SEYMOUR EDWARD KARMINSKI

Sir WILLIAM ARTHIAN DAVIES

Sir ERIC SACHS

Attorney-General

Sir REGINALD EDWARD MANNINGHAM-BULLER

Solicitor-General

Sir HARRY BRAUSTYN HYLTON-FOSTER

The Mode of Citation of the Volumes of the *Law Reports* for 1956, is as follows:—

[1956] Ch. [1956] P.
[1956] 1 Q.B. [1956] 2 Q.B.
[1956] A.C.

TABLE OF CASES REPORTED
IN THIS VOLUME

PAGE

B

Barclays Bank Ltd., Powe *v.* In the Estate of Powe, decd. - - - - - 110
Barker, Mosey and, Mosey *v.* 26
Beigan *v.* Beigan - - - 313
Best *v.* Best - - - - 76
Bradley *v.* Bradley - - 326
Bradshaw *v.* Bradshaw - 274n.
Brown *v.* Brown - - - 438
Buckle *v.* Buckle (orse. Williams) - - - - - 181

C

Chard *v.* Chard - - - 259
Crawford *v.* Crawford - - 195

D

Davies *v.* Davies - - - 212
Dickerson, Francis and, Francis *v.* - - - - - 87

E

Eaves *v.* Eaves and Powell - 154
Elliott *v.* Elliott - - - 160

F

Forbes *v.* Forbes - - - 16
Francis *v.* Francis and Dickerson - - - - - 87
Fribance *v.* Fribance - - 99

PAGE

G

Guildford, The - - - 364

H

Harvey *v.* Harvey - - - 102

I

Ingram *v.* Ingram - - - 390

J

Jefferson *v.* Jefferson - - 136
Jenkins *v.* Jenkins - - - 458

L

Lewis *v.* Lewis - - 205n.

M

Marczuk *v.* Marczuk - - 217
Mosey *v.* Mosey and Barker - 26
Moss *v.* Moss - - - 373

N

National Assistance Board, Taylor (formerly Kraupl) *v.* 470

PAGE

P

Powe, decd., In the Estate of. Powe *v.* Barclays Bank Ltd. - 110
Powell, Eaves and, Eaves *v.* - 154

R

Ramsay-Fairfax (orse. Scott-Gibson) *v.* Ramsay-Fairfax 115
Russell *v.* Russell - 283

S

S. *v.* S. (orse. C.) - 1
St. Mark's Church, Lincoln, *In re* - 166, 336
Scott-Gibson (orse. Ramsay-Fairfax) *v.* Ramsay-Fairfax 115
Simmonds *v.* Simmonds - 47
Smyth *v.* Smyth - 427

T

Taylor (formerly Kraupl) *v.* National Assistance Board - 470
Temple Bar (Owners) *v.* Guildford (Owners). The Guildford - 364
Thompson *v.* Thompson - 414

W

Waller *v.* Waller - 302
Waters *v.* Waters - 344
Wilby, decd., *In re* - 174

Y

Yahuda, decd., In the Estate of - 388

TABLE OF CASES CITED AND JUDICIALLY NOTICED IN THIS PART

ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

			PAGE
Abercrombie *v.* Abercrombie	[1943] 2 All E.R. 465	*R.*	237
Abson *v.* Abson	[1952] P. 55; [1952] 1 T.L.R. 379; [1952] 1 All E.R. 370	*R.*	239, 246, 247, 251
Abson *v.* Abson	[1952] P. 55; [1952] 1 T.L.R. 379; [1952] 1 All E.R. 370		289
Addison (orse. McAlister) *v.* Addison	[1955] N.I. 1	*R.*	134
Allen *v.* Allen	[1951] W.N. 322; [1951] 1 All E.R. 724	*R.*	453
Allen *v.* Allen	[1894] P. 134; 10 T.L.R. 161		483
Andros, *In re*	24 Ch.D. 637		176
Anghinelli *v.* Anghinelli	[1918] P. 247; 34 T.L.R. 438		127
Armytage *v.* Armytage	[1898] P. 178; 14 T.L.R. 480		127
Atkins *v.* Atkins and Urquhart	[1913] P. 211	*R.*	84
Attorney-General *v.* St. Pancras Vestry	69 L.T. 627	*R.*	172
B. *v.* B.	[1944] 3 W.W.R. 113		10
Bagettes Ltd. *v.* G. P. Estates Ltd.	[1956] Ch. 290; [1956] 1 All E.R. 729	*Appl.*	470, 495
Barker *v.* Barker	[1952] P. 184; [1952] 1 T.L.R. 1479; [1952] 1 All E.R. 1128	*Dist.*	27, 41
Barkway *v.* South Wales Transport Co. Ltd.	[1949] 1 K.B. 54; 64 T.L.R. 462; [1948] 2 All E.R. 460	*R.*	114
Barnard *v.* National Dock Labour Board	[1953] 2 Q.B. 18; [1953] 1 All E.R. 1113	*Appl.*	470, 494
Barnett *v.* Barnett	[1955] P. 21; [1954] 3 All E.R. 689	*Dist.*	313, 318–320, 322, 323, 325
Bartholomew *v.* Bartholomew	[1952] W.N. 535; [1952] 2 T.L.R. 934; [1952] 2 All E.R. 1035		347
Bartram *v.* Bartram	[1950] P. 1; 65 T.L.R. 492; [1949] 2 All E.R. 270	*R.*	108
Baxter *v.* Baxter	[1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886	*R.*	11, 13

Baxter *v.* Baxter	[1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886	*Appl.*	115, 132
Beard *v.* Beard	[1946] P. 8; 61 T.L.R. 555; [1945] 2 All E.R. 306	*R.*	318
Beaumont *v.* Beaumont	[1933] P. 39; 49 T.L.R. 35	*R.*	40
Beeby *v.* Beeby	1 Hag.Ecc. 789	*R.*	252
Beeken *v.* Beeken	[1948] P. 302	*R.*	410
Beer *v.* Beer	[1948] P. 10; 63 T.L.R. 606; [1947] 2 All E.R. 711	*Appl.*	161, 165
Bellenden *v.* Satterthwaite	[1948] 1 All E.R. 343	*R.*	98
Bennett *v.* Bennett	[1951] 2 K.B. 572; [1951] 1 T.L.R. 873; [1951] 1 All E.R. 1088; [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413	*Appl.*	48, 62
Bennett *v.* Bennett	[1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413		290
Bermondsey Borough Council *v.* Mortimer	[1926] P. 87	*R.*	171
Bermondsey Borough Council *v.* Mortimer	[1926] P. 87	*R.*	343
Bethel *v.* Bethel and Brown	63 T.L.R. 387		445
Bevan *v.* Bevan (No. 2)	[1955] 1 W.L.R. 1142; [1955] 3 All E.R. 332	*Appr.*	313, 319, 322, 323
Bharatkhand, The	[1952] 1 Lloyd's Rep. 470		368
Bideford Parish, *In re*	[1900] P. 314; 16 T.L.R. 540	*Appl.*	167, 173
Bideford Parish, *In re*	[1900] P. 314; 16 T.L.R. 540	*Appl.*	337, 341, 342
Bidie, *In re*	[1948] Ch. 697; [1949] Ch. 122; 65 T.L.R. 25; [1948] 2 All E.R. 995		41
Blanchard, *In re*	48 T.L.R. 402		214
Blunt *v.* Blunt	[1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76	*R.*	455
Boyd, *In re*	[1895] 1 Q.B. 611	*R.*	40, 41
Boyd *v.* Boyd	[1955] P. 126n.; 55 T.L.R. 3; [1938] 4 All E.R. 181	*R.* *Dist.*	201 205, 208, 209
Bradshaw *v.* Bradshaw	[1956] P. 274	*C.*	259, 270–272
Bradshaw *v.* Bradshaw	[1956] P. 274n.		416
Bragg *v.* Bragg	[1925] P. 20; 41 T.L.R. 8	*R.*	296
Bremner, *Ex p.*, Bremner *v.* Bremner and *In re* Brett	L.R. 1 P. & M. 254		482
British Columbia Electric Railway Co. Ltd. *v.* Loach	[1916] 1 A.C. 719	*R.*	450

Brophy, *In re*, Yadwyn *v.* Martin	[1949] N.Z.L.R. 1006		177
Brown *v.* Brown	1 Hagg.Ecc. 523		6
Brown *v.* Brown	[1956] P. 438; [1956] 2 All E.R. 1	*E.*	459, 462, 464, 467–469
Brydges *v.* Brydges and Wood	[1909] P. 187; 25 T.L.R. 505		29
Buchler *v.* Buchler	[1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319	*R.*	198, 207, 208
Buchler *v.* Buchler	[1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319	*R.*	355
Bullock *v.* Bullock	[1942] P. 134; 58 T.L.R. 333; [1942] 2 All E.R. 259	*R.*	308
Burnfiel *v.* Burnfiel	2 D.L.R. 129		177
Burroughes *v.* Abbott	[1922] 1 Ch. 86; 38 T.L.R. 167	*Appl.*	136, 144, 149, 151
Burton *v.* Burton	[1945] 3 W.W.R. 1		10
C. *v.* C.	[1949] 1 W.W.R. 911		10
Cackett (orse. Trice) *v.* Cackett	[1950] P. 253; 66 T.L.R. (Pt. 1) 723; [1950] 1 All E.R. 677	*R.*	24
Callister *v.* Callister	[1947] W.N. 221; 63 T.L.R. 503	*R.*	232
Callister *v.* Callister	[1947] W.N. 221; 63 T.L.R. 503	*C.*	438, 452
Carnarvon Harbour Acts, 1793–1903, *In re*, Thomas *v.* Attorney-General	[1937] Ch. 72; [1936] 2 All E.R. 1325	*Dist.*	470, 494
Casey *v.* Casey	[1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110	*R.*	118, 122, 125
Castrique *v.* Imrie	L.R. 4 H.L. 414	*R.*	405
Chapelle *v.* Chapelle	[1950] P. 134; 66 T.L.R. (Pt. 1) 109; [1950] 1 All E.R. 236	*R.*	121
Chard *v.* Chard	[1956] P. 259; [1955] 3 All E.R. 721	*R.*	416, 420, 424
Charles *v.* Charles	36 L.J.P. & M. 17	*R.*	68
Chipchase *v.* Chipchase	[1939] P. 391; 55 T.L.R. 1067; [1939] 3 All E.R. 895	*C.*	259, 271, 272, 276
Church *v.* Church	[1952] P. 313; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441	*R.*	319
Churchman *v.* Churchman	[1945] P. 44; 61 T.L.R. 464; [1945] 2 All E.R. 190	*R.*	226
Churchman *v.* Churchman	[1945] P. 44; 61 T.L.R. 464; [1945] 2 All E.R. 190	*R.*	448
City of Lincoln, The	15 P.D. 15	*Appl.*	365, 370, 371
Clan Lamont, The	79 Ll.L.Rep. 521	*R.*	372

Clutterbuck *v.* Clutterbuck	29 T.L.R. 480		328
Coleman *v.* Coleman and Simpson	[1920] P. 71; 36 T.L.R. 255	*R.*	39
Colquhoun *v.* Brooks	21 Q.B.D. 52; 4 T.L.R. 494	*R.*	251
Combe *v.* Combe	[1951] 2 K.B. 215; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767		51
Commissioners for Special Purpose of Income Tax *v.* Pemsel	[1891] A.C. 531		238
Constantinidi *v.* Constantinidi and Lance	[1903] P. 246; 19 T.L.R. 699; [1905] P. 253; 21 T.L.R. 651	*R.*	454, 455
Cooper *v.* Cooper	[1954] 3 W.L.R. 867; [1954] 3 All E.R. 415	*R.*	24, 25
Cooper *v.* Cooper (No. 1)	[1955] P. 99; [1954] 3 All E.R. 415	*Appl.*	195, 200, 201
Cooper *v.* Cooper (No. 1)	[1955] P. 99; [1954] 3 All E.R. 415	*Appl.*	390. 408
Cooper *v.* Lloyd	6 C.B.N.S. 519	*R.*	233, 252
Copeland *v.* Greenhalf	[1952] Ch. 448; [1952] 1 T.L.R. 786; [1952] 1 All E.R. 809		339
Corke *v.* Rainger	[1912] P. 69; 28 T.L.R. 130	*R.*	342
Cox *v.* Cox	70 L.T. 200	*Dist.* *R.*	438, 454, 456–458 468
Cramp *v.* Cramp and Freeman	[1920] P. 158; 36 T.L.R. 333		221
Crawford *v.* Crawford	[1956] P. 195; [1955] 3 All E.R. 592	*Appl.*	390, 409
Crears *v.* Hunter	19 Q.B.D. 341		8
Crippen, In the Estate of	[1911] P. 108	*R.*	406
Cross *v.* Cross	43 L.T. 533		478
Cunnington *v.* Cunnington and Noble	1 Sw. & Tr. 475		443
Curtis *v.* Curtis	4 Sw. & Tr. 234	*R.*	254
Cutler *v.* Wandsworth Stadium Ltd.	[1945] W.N. 40; 61 T.L.R. 273; [1945] 1 All E.R. 105		290
D——E *v.* A——G (orse. D——E)	1 Rob.Ecc. 279	*Appl.*	2, 11, 12, 14
Daglish *v.* Daglish	[1936] P. 49; 52 T.L.R. 171		214
Dalrymple *v.* Dalrymple	2 Hag.Con. 54		176
Dashwood *v.* Magniac	[1892] W.N. 54	*R.*	156
Davies *v.* Littlejohn	34 C.L.R. 174		482
Dayrell-Steyning *v.* Dayrell-Steyning	[1922] P. 280; 38 T.L.R. 898	*R.*	144, 145, 151
Deakin *v.* Deakin	33 J.P. 805	 *Appl.*	264 275, 278, 280–282
Debtor, A, *In re* (No. 335 of 1947)	64 T.L.R. 446; [1948] 2 All E.R. 533		224, 238
Dent *v.* Dent	4 Sw. & Tr. 105	*R.*	253
De Reneville *v.* De Reneville	[1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 57	*R.*	118, 121, 122, 135

De Reneville *v.* De Reneville	[1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56		184
Dering *v.* Dering and Blakeley	L.R. 1 P. & M. 531		442
Dickinson *v.* Dickinson	[1913] P. 198; 29 T.L.R. 765	*Appl.*	2, 15
Dipple *v.* Dipple	[1942] P. 65; 58 T.L.R. 141; [1942] 1 All E.R. 234	*Appl.*	27, 39, 46, 47
Dixon *v.* Dixon	[1953] P. 103; [1953] 1 All E.R. 910		162
Dixon *v.* Dixon	67 L.T. 394		444
Donegal *v.* Donegal	3 Phillim. 597		129
Dowell *v.* Dowell	[1952] 2 All E.R. 141; [1952] W.N. 296		52
Dunn *v.* Dunn	13 P.D. 91; 4 T.L.R. 399	*R.*	309
Easterbrook *v.* Easterbrook (orse. Jervis)	[1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90	*Appr.*	115, 119, 133
Eaves, *In re*	[1940] Ch. 109; 56 T.L.R. 110; [1939] 4 All E.R. 260		9
Edwards *v.* Edwards	[1948] P. 268; 64 T.L.R. 61; [1948] 1 All E.R. 157	*Appl.*	205, 208, 209
Ellenborough Park, *In re*	[1956] Ch. 131; [1955] 3 All E.R. 667		339
England *v.* England	[1953] P. 16; [1952] 2 T.L.R. 705; [1952] 2 All E.R. 784	*R.*	226
Enohin *v.* Wylie	10 H.L.C. 1	*R.*	180
Enohin *v.* Wylie	10 H.L.C. 1		389
Esch *v.* Nelson	1 T.L.R. 610	*R.*	114
Evans *v.* Evans	[1948] 1 K.B. 175; 63 T.L.R. 638; [1947] 2 All E.R. 656		223
Evans *v.* Evans and Elford	[1906] P. 125; 22 T.L.R. 322	*R.*	454, 455
Everett *v.* Everett	[1919] P. 298	*R.*	306–308
F. *v.* F.	1945 S.C. 202	*R.*	13
F. *v.* P.	75 L.T. 192		6
Fishburn *v.* Fishburn	[1955] P. 29; [1955] 1 All E.R. 230	*Dist.*	313, 318–320, 322, 323, 325
Fisher *v.* Fisher	[1942] P. 101; 58 T.L.R. 191; [1942] 1 All E.R. 438	*R.*	66, 70, 73, 75
Flying Fish, The	Br. & Lush. 436		367
Forbes *v.* Forbes	[1954] 1 W.L.R. 1526; [1954] 3 All E.R. 461		162
Foster *v.* Frazer	[1893] 3 Ch. 158; 9 T.L.R. 502	*R.*	168
Fowler *v.* Fowler	[1952] 2 T.L.R. 143	*Dist.*	17, 24, 26
Francis *v.* Francis and Dickerson	[1956] P. 87	*R.*	159

G. *v.* G. (orse. K.)	25 T.L.R. 328	*Dist.*	2, 14
G—— *v.* G——	L.R. 2 P. & M. 287	*Appl.*	2, 11
G. *v.* G. (sub nom. Graham *v.* Reith)	[1924] A.C. 349; 40 T.L.R. 322		6
Gaisberg *v.* Storr	[1950] 1 K.B. 107; 65 T.L.R. 485; [1949] 2 All E.R. 411		51
Gaisberg *v.* Storr	[1950] 1 K.B. 107; 65 T.L.R. 485; [1949] 2 All E.R. 411		289
Gandy *v.* Gandy	7 P.D. 77, 168		51
Garforth-Bles *v.* Garforth-Bles	[1951] P. 218; [1951] 1 T.L.R. 449; [1951] 1 All E.R. 308	*C.*	77, 86
Gaskill *v.* Gaskill	[1921] P. 425; 37 T.L.R. 977	*R.*	165
Genua, The	55 Ll.L.Rep. 139		368
Giles *v.* Randall	[1915] 1 K.B. 290	*R.*	95
Glenister *v.* Glenister	[1945] P. 30; [1945] 1 All E.R. 513	*Appl.*	161, 164, 165
Glenister *v.* Glenister	[1945] P. 30; [1945] 1 All E.R. 513	*R.*	211
Glenister *v.* Glenister	[1945] P. 30; [1945] 1 All E.R. 513	*R.*	453
Goodinson *v.* Goodinson	[1954] 2 Q.B. 118; [1954] 2 All E.R. 255		52
Goodman's Trusts, *In re*	17 Ch.D. 266	*R.*	179
Grant *v.* Grant, Bowles and Patteson	2 Sw. & Tr. 522		29
Griffiths *v.* Griffiths	28 T.L.R. 281		214
H. *v.* H.	45 T.L.R. 618		6
H. *v.* H.	1949 S.C. 587		7
H.M.S. London	[1914] P. 72		368
Hadden *v.* Hadden	The Times, Dec. 5, 1919	*R.*	25
Hall *v.* Hall	3 Sw. & Tr. 390		29
Harford *v.* Morris	2 Hag.Con. 423		126
Harrington, *In re*	[1908] 2 Ch. 687		34
Harthan *v.* Harthan	[1949] P. 115; [1948] 2 All E.R. 639	*Appl.*	2, 13, 14
Hasting *v.* Hasting	[1948] P. 68; 63 T.L.R. 564; [1947] 2 All E.R. 744	*Appl.*	48, 70, 72–74
Haswell *v.* Haswell and Sanderson	1 Sw. & Tr. 502		162
Haswell *v.* Haswell and Sanderson	1 Sw. & Tr. 502	*R.*	210, 211
Hayward *v.* Hayward	1 Sw. & Tr. 81		478
Hedderwick, *In re*	[1933] Ch. 669	*R.*	41
Helm *v.* Helm	Judgments of Court of Appeal, 1954, No. 100	*Appl.*	2, 11
Henderson *v.* Henderson and Crellin	[1944] A.C. 49; 60 T.L.R. 113; [1944] 1 All E.R. 44	*R.*	229, 230, 237
Herod *v.* Herod	[1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722	*R.*	232

Herod *v.* Herod	[1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722	*R.*	315
Herod *v.* Herod	[1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722	*R.*	398
Herod *v.* Herod	[1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722	*R.*	450, 452, 465
Hichens *v.* Hichens	[1945] P. 23; 61 T.L.R. 302; [1945] 1 All E.R. 451	*Appl.*	99, 100, 101
Hickman *v.* Peacey	[1945] A.C. 304; 114 L.J.Ch. 225; 173 L.T. 89; 61 T.L.R. 489; [1945] 2 All E.R. 215		276
Hickman *v.* Upsall	L.R. 20 Eq. 136		417
Higgs *v.* Higgs	[1935] P. 28		291
Hill, decd., In the Estate of	[1948] P. 341; [1948] 2 All E.R. 489	*C.*	111, 113, 114
Hogton *v.* Hogton	50 T.L.R. 18	*R.* *Appl.*	270 275, 280, 281
Holborn *v.* Holborn	[1947] W.N. 70; 63 T.L.R. 87; [1947] 1 All E.R. 32	*R.*	209
Hollington *v.* F. Hewthorn & Co.	[1943] K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35	*Dist.*	390, 400–402, 405–407
Hollinshead *v.* Hazleton	[1916] 1 A.C. 428; 32 T.L.R. 177	*R.*	497
Holt *v.* Holt and Fleeming	28 L.J.P. & M. 12	*R.*	305, 311
Hood Barrs *v.* Heriot	[1896] A.C. 174	*R.*	497
Hope *v.* Hope	1 Sw. & Tr. 94	*R.*	232
Hopewell *v.* De Pinna	2 Camp. 113	*R.*	273
Horton *v.* Horton	[1940] P. 187	*R.*	352
Horton *v.* Horton	[1948] W.N. 3; 64 T.L.R. 62; [1947] 2 All E.R. 871	*Appl.*	2, 15, 16
Hosegood *v.* Hosegood	[1950] W.N. 218; 66 T.L.R. (Pt. 1) 735	*R.*	320, 360
Huddleston *v.* Furness Railway Co.	15 T.L.R. 238	*R.*	158
Hughes *v.* Hughes	L.R. 1 P. & M. 219	 *R.*	442 465
Hunt *v.* De Blaquière	5 Bing. 550		478
Hutter *v.* Hutter (orse. Perry)	[1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368	*Appr.*	115, 119, 120, 122–125, 133, 134
Hyde *v.* Hyde	[1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362	*Dist.*	27, 39, 42
Hyman *v.* Hyman	[1929] A.C. 601; 45 T.L.R. 444	*Appl.*	48, 62
Hyman *v.* Hyman	[1929] A.C. 601; 45 T.L.R. 444	*Dist.*	284, 294, 295, 299

Inland Revenue Commissioners *v.* Cook	[1946] A.C. 1; [1945] 2 All E.R. 377	*R.*	141
Inverclyde (orse. Tripp) *v.* Inverclyde	[1931] P. 29; 47 T.L.R. 140	*O.*	115, 118–122, 132, 133
Isaac *v.* Isaac	[1955] P. 333; [1955] 2 All E.R. 811	*Appl.*	155, 158–160
Ivens *v.* Ivens	[1955] P. 129; [1954] 3 All E.R. 446	*R.*	201
Ivens *v.* Ivens	[1955] P. 129; [1954] 2 All E.R. 446	*Appl.*	390, 409
Ivett *v.* Ivett	143 L.T. 680; 94 J.P. 237; 28 L.G.R. 479	*R.* *Appl.*	270 275, 277, 280, 281
J. *v.* J.	[1955] P. 215; [1955] 2 All E.R. 617	*R.*	142, 151
James *v.* James	[1948] 1 All E.R. 214		429
Jamieson *v.* Jamieson	[1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875	*R.*	24, 25
Jamieson *v.* Jamieson	[1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875	*Appl.*	195, 200, 202, 204
Jamieson *v.* Jamieson	1951 S.C. 286; [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875	*Appl.*	345, 355, 358, 362
Jamieson *v.* Jamieson	[1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875	*R.*	400
Jamieson *v.* Jamieson	[1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875	*R.*	456
Jeffrey *v.* Jeffrey	[1951] P. 32; 66 T.L.R. (Pt. 2) 294; [1950] 2 All E.R. 449	*Dist.*	212, 215–217
Kaslefsky *v.* Kaslefsky	[1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398	*R.*	20
Kaslefsky *v.* Kaslefsky	[1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398		198
Keats *v.* Keats and Montezuma	1 Sw. & Tr. 334	*R.*	252
Keegan *v.* Smith	8 D. & R. 118		478
Kelly *v.* Kelly	L.R. 2 P. & M. 59		25
Kelly *v.* Kelly	L.R. 2 P. & M. 31, 59	*R.*	352
Kendall *v.* Kendall	[1952] 2 All E.R. 1038n.	*F.*	427, 430, 431
Keyes *v.* Keyes and Gray	[1921] P. 204; 37 T.L.R. 499	*R.*	191, 194
Kilford *v.* Kilford	[1947] P. 100; 63 T.L.R. 436; [1947] 2 All E.R. 381		54

Kilford *v.* Kilford	[1947] P. 100; 63 T.L.R. 436; [1947] 2 All E.R. 381	*Dist.*	284, 296
Kingcome, *In re*	[1936] Ch. 566; 52 T.L.R. 268; [1936] 1 All E.R. 173	*R.*	145
King *v.* King	[1954] P. 55; [1953] 2 All E.R. 1029	*Dicta. appl.*	326, 335
King *v.* King	[1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584	*R.*	358, 359
King *v.* King	[1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584		400
Knott *v.* Knott	[1935] P. 158		291
Knott *v.* Knott	[1935] P. 158; 51 T.L.R. 499	*R.*	430, 431
L. *v.* L. (orse. W.)	7 P.D. 16	*Appl.*	2, 12, 14
Lambert *v.* Lambert	[1936] 3 All E.R. 20		54
Landau, *In re*, *Ex p.* Trustee	[1934] Ch. 549; 50 T.L.R. 403	*R.*	497
Lane *v.* Lane	[1952] P. 34; [1952] 1 T.L.R. 250; [1952] 1 All E.R. 223	*R.*	107, 109
Lang *v.* Lang	[1955] A.C. 402; [1954] 3 All E.R. 571		20
Lang *v.* Lang	[1955] A.C. 402; [1954] 3 All E.R. 571	*R.*	201
Lang *v.* Lang	[1955] A.C. 402; [1954] 3 All E.R. 571	*Appl.*	345, 358, 360
Lang *v.* Lang	[1955] A.C. 402; [1954] 3 All E.R. 571	*Appl.*	390, 409, 410, 412
Lankester *v.* Lankester and Cooper	[1925] P. 114; 41 T.L.R. 594		442
Lauder *v.* Lauder	[1949] P. 277; [1949] 1 All E.R. 76	*R.*	349, 352
Lavey, *In re*	[1921] 1 K.B. 344	*R.*	96
Leavis *v.* Leavis	[1921] P. 299	*R.*	239, 248
Legge *v.* Legge	45 T.L.R. 157		55
Le Mesurier *v.* Le Mesurier	[1895] A.C. 517; 11 T.L.R. 481	*R.*	131
Le Mesurier *v.* Le Mesurier	46 T.L.R. 203	*R.*	193, 194
Lewis *v.* Lewis	[1892] P. 212; 8 T.L.R. 489		214
Lewis *v.* Lewis	[1955] 3 W.L.R. 862n.; [1955] 3 All E.R. 598		162
Lewis *v.* Lewis	[1956] P. 205n.	*Dist.*	195, 201, 204
Leyman *v.* Latimer	3 Ex.D. 15, 352	*R.*	401, 405, 406
Lindo *v.* Belisario	1 Hag.Con. 216		126
Ling *v.* Ling and Croker	4 Sw. & Tr. 99		29
Lloyd *v.* Lloyd and Hill	[1947] P. 89; 63 T.L.R. 110; [1947] 1 All E.R. 383	*R.*	320

Longsdon *v.* Minister of Pensions	[1956] 1 Q.B. 587; [1956] 1 All E.R. 83		481
Lyons, *In re*	[1952] Ch. 129; [1951] 2 T.L.R. 1256; [1952] 1 All E.R. 34	*R.*	141
Lyon *v.* Lyon	[1953] P. 1; [1952] 2 T.L.R. 775; [1952] 2 All E.R. 831	*R.*	95, 97
MacDarmaid *v.* Attorney-General	[1950] P. 218; 66 T.L.R. (Pt. 1) 543; [1950] 1 All E.R. 497	*Appl.*	259, 269, 271, 273, 276
Mackenzie *v.* Mackenzie	[1895] A.C. 384	*R.*	25
Mackrell *v.* Mackrell	[1948] 2 All E.R. 858		104
McLellan *v.* McLellan	[1954] P. 138; [1954] 1 All E.R. 1	*F.*	326, 335, 336
Maclurcan *v.* Maclurcan	77 L.T. 474		32
McM. *v.* McM.; McK. *v.* McK.	[1936] I.R. 177		10
Maconochie *v.* Maconochie	[1916] P. 326; 33 T.L.R. 50		29
Manser *v.* Manser	[1940] P. 224		418
Marjoram *v.* Marjoram	[1955] 1 W.L.R. 520; [1955] 2 All E.R. 1	*R.*	354
Marsh *v.* Marsh	[1945] A.C. 271; 62 T.L.R. 20		187
Marshall (W. F.) Ltd. *v.* Barnet & Fitzpatrick	[1953] 1 W.L.R. 639; [1953] 2 All E.R. 970	*R.*	283
Medley *v.* Medley	7 P.D. 122		34
Metagama, The	1928 S.C.(H.L.) 21	*R.*	370, 371
Miles *v.* Chilton	1 Rob.Ecc. 684	*R.*	274
Miller *v.* James	L.R. 3 P. & M. 4		389
Mills *v.* Mills	[1940] P. 124; 56 T.L.R. 561; [1940] 2 All E.R. 254	*Appl.*	48, 62, 63, 65, 73
Mills *v.* Mills	[1940] P. 124; 56 T.L.R. 561; [1940] 2 All E.R. 254		290
Mills' Trusts, *In re*	40 Ch.D. 14		8
Montagu *v.* Earl of Sandwich	32 Ch.D. 525; 2 T.L.R. 392	*C.*	27, 43, 44
Morgan *v.* Morgan	[1949] W.N. 250	*N.F.*	2
Moss *v.* Moss	[1956] 2 W.L.R. 469; [1956] 1 All E.R. 291		473
Mummery *v.* Mummery	[1942] P. 107; 58 T.L.R. 203; [1942] 1 All E.R. 553	*R.*	108
Mummery *v.* Mummery	[1942] P. 107; 58 T.L.R. 203; [1942] 1 All E.R. 553	*R.*	235
Napier *v.* Napier	[1915] P. 184; 31 T.L.R. 472	*R.*	15
National Assistance Board *v.* Parkes	[1955] 2 Q.B. 506; [1955] 3 All E.R. 1		480
Nepean *v.* Doe *d.* Knight	2 M. & W. 894	*Dicta. N.F.*	259, 268, 269, 273

Nepean *v.* Doe *d.* Knight	2 M. & W. 894		416
Newson *v.* Newson	50 T.L.R. 399	*R.*	79, 80, 85
Niboyet *v.* Niboyet	4 P.D. 1		126
Oropesa, The	[1942] P. 140; [1943] P. 32; 59 T.L.R. 103; [1943] 1 All E.R. 211	*Appl.*	365, 369–371
Otway *v.* Otway	13 P.D. 141; 4 T.L.R. 523	*R.*	306
Ousey *v.* Ousey and Atkinson	3 P.D. 223		162
Owen *v.* Thomas	3 M. & K. 353		38
Paddington Borough Council *v.* Attorney-General	[1906] A.C. 1; 22 T.L.R. 55		168, 172
Paddington Borough Council *v.* Attorney-General	[1906] A.C. 1; 22 T.L.R. 55	*R.*	342, 343
Paludina, The	[1925] P. 40; [1927] A.C. 16	*Appl.*	365, 370, 373
Paquine *v.* Snary	[1909] 1 K.B. 688; 25 T.L.R. 212	*R.*	496, 497
Parkinson *v.* Parkinson	[1939] P. 346; 55 T.L.R. 860; [1939] 3 All E.R. 108		276
Parkinson *v.* Parkinson	[1939] P. 346; 55 T.L.R. 860; [1939] 3 All E.R. 108	*C.*	414, 421, 424, 425
Parry *v.* Parry	[1896] P. 37; 12 T.L.R. 126		443
Parsons *v.* Parsons	[1907] P. 331; 23 T.L.R. 749		214
Pearson, *In re.* The Equity Trustees Executors and Agency Co. Ltd. *v.* Michaelson-Yeates	[1946] V.L.R. 356		177
Pearson *v.* Pearson	[1948] W.N. 225; 64 T.L.R. 445	*R.*	320
Peete, *In re*	[1952] W.N. 406; [1952] 2 T.L.R. 383; [1952] 2 All E.R. 599	*C.*	259, 267, 276
Perks *v.* Perks	[1946] P. 1; 62 T. L.R. 26; [1945] 2 All E.R. 580	*F.*	427, 432–435, 437
Perry *v.* Perry	[1952] P. 203; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076	*Appl.*	102, 107–109
Perry *v.* Perry	[1952] P. 203; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076	*R.*	230, 235
Pettit, *In re*	[1922] 2 Ch. 765; 38 T.L.R. 787	*C.*	137, 141, 144, 145, 150, 153
Phené's Trusts, *In re*	L.R. 5 Ch. 139	*C.*	259, 270–272, 276
Pike *v.* Pike	[1954] P. 81n.; [1953] 1 All E.R. 232		348
Plows *v.* Plows	44 T.L.R. 263	*R.*	452
Practice Direction	[1954] 1 W.L.R. 898; [1954] 2 All E.R. 349		74
Practice Direction	[1955] 1 W.L.R. 703	*R.*	75
Pratt *v.* Pratt	[1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437	*R.*	316

Pratt *v.* Pratt	96 L.J.P. 123; 43 T.L.R. 523	*R.*	431
Preston-Jones *v.* Preston-Jones	[1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124	*R.*	266
Prinsep *v.* Prinsep	[1929] P. 225; 45 T.L.R. 376; [1930] P. 35; 46 T.L.R. 29	*Appl.*	77, 82
Pritchard *v.* Ovey	1 J. & W. 396		38
Prudential Assurance Co. *v.* Edmonds	2 App.Cas. 487	*Appl.*	259, 271, 273
Prudential Assurance Company *v.* Edmonds	2 App.Cas. 487	*R.*	420
Pugh (orse. Eperjesy) *v.* Pugh	[1951] P. 482; [1951] 2 T.L.R. 806; [1951] 2 All E.R. 680		186
Quintin Dick, *In re*	[1926] Ch. 992; 42 T.L.R. 681	*R.*	16
Ramsden *v.* Ramsden	[1954] 1 W.L.R. 1105; [1954] 2 All E.R. 623	*R.*	350
Read *v.* Read	[1952] P. 119; [1951] 2 T.L.R. 1086	*R.*	231, 232, 250
Reg. *v.* Cullen	9 C. & P. 681	*R.*	422
Reg. *v.* Curgurwen	L.R. 1 C.C.R. 1		263
Reg. *v.* Inhabitants of Watford	9 Q.B. 626	*R.*	256
Reg. *v.* Jones	11 Q.B.D. 118		263
Reg. *v.* Lumley	L.R. 1 C.C.R. 196		419
Reg. *v.* Vestry of St. Pancras	24 Q.B.D. 371; 6 T.L.R. 175		477
Reg. *v.* Willshire	6 Q.B.D. 366		263
Reilly *v.* Booth	44 Ch.D. 12		339
Rex *v.* Ingram	The Times, July 3, 1940, p. 2		393
Rex *v.* Inhabitants of Harborne	2 Ad. & El. 540	*Appl.*	259, 269
Rex *v.* Lumley	L.R. 1 C.C.R. 196	*Appl.*	259, 269
Rex *v.* Lund	16 Cr.App.R. 31	*R.*	422, 426
Rex *v.* Middlesex Justices. *Ex p.* Bond	[1933] 1 K.B. 72		291
Richards *v.* Richards	[1952] P. 307; [1952] 1 T.L.R. 1321; [1952] 1 All E.R. 1384	*C.* *E.*	438, 450, 452 459, 464–466, 468, 469
Richards *v.* Richards and Flockton	[1942] P. 68n.	*Appl.*	27, 39, 40
Robert (orse. De la Mare) *v.* Robert	[1947] P. 164; 63 T.L.R. 343; [1947] 2 All E.R. 22	*R.*	118, 123
Roberts *v.* Brennan	[1902] P. 143; 18 T.L.R. 467	*R.*	117, 118
Robertson *v.* Robertson and Favagrossa	8 P.D. 94	*R.*	69
Robins *v.* National Trust Co.	[1927] A.C. 515; 43 T.L.R. 243	*R.*	227, 277
Robins *v.* National Trust Co.	[1927] A.C. 515; 43 T.L.R. 243	*R.*	373
Robins *v.* National Trust Co.	[1927] A.C. 515; 43 T.L.R. 243	*R.*	448
Robinson, *In re*	27 Ch.D. 160	*R.*	497
Ross *v.* Ross	129 Mass. 243		177
Ross *v.* Ross	[1950] P. 160; 66 T.L.R. (Pt. 1) 755; [1950] 1 All E.R. 654		51

Ross *v.* Ross	[1950] P. 160; 66 T.L.R. (Pt. 1) 755; [1950] 1 All E.R. 654	*Dist.*	284, 296
Rowe *v.* Rowe	4 Sw. & Tr. 162		441
Rowell *v.* Rowell	[1900] 1 Q.B. 9; 16 T.L.R. 10		225
Ruther *v.* Ruther	[1903] 2 K.B. 270	*Appl.*	218, 231, 232, 234, 243, 245–247, 250, 255–257
Ryde and Stedman's Contract, *In re*	[1927] 2 Ch. 72		238
St. Botolph, Aldersgate Without	[1900] P. 69	*R.*	172
St. Botolph, Aldersgate Without	[1900] P. 69	*R.*	343
St. Gabriel, Fenchurch Street (Rector) *v.* City of London Real Property Co. Ltd.	[1896] P. 95		167
St. Gabriel, Fenchurch Street (Rector, etc.) *v.* City of London Real Property Co. Ltd.	[1896] P. 95	*R.*	341, 342
St. John's, Hampstead	[1939] P. 281		338
St. Mark's Church, Lincoln, *In re*	[1956] P. 166; [1955] 3 All E.R. 699	*Aff.*	337
St. Nicholas Acons *v.* London County Council	[1928] A.C. 469; 44 T.L.R. 656	*Appl.*	167, 171, 172
St. Nicholas Acons (Rector, etc.) *v.* London County Council	[1928] A.C. 469; 44 T.L.R. 656	*Appl.*	337, 342, 343
St. Nicholas Cole Abbey, *In re*; St. Benet Fink Churchyard, *In re*; St. Benet Sherehog, *In re*	[1893] P. 58, 66n.; Trist.'s Judgmts. 274		338
St. Nicholas, Leicester (Vicar of) *v.* Langton	[1899] P. 19	*R.*	172
St. Paul *v.* St. Paul and Farquhar	L.R. 1 P. & M. 739		443
Salvesen (or von Lorang) *v.* Austrian Property Administrator	[1927] A.C. 641; 43 T.L.R. 609	*R.*	120, 121
S. G. *v.* W. G.	1933 S.C. 728		10
Scollick *v.* Scollick	[1927] P. 205	*R.*	79, 84, 85
Scott *v.* Scott	[1921] P. 107; 37 T.L.R. 158	*R.*	66, 70
Scott *v.* Scott	[1951] P. 245; [1951] 1 All E.R. 216	*Dicta N.F.*	326, 330, 331, 333, 334
Self *v.* Self	[1954] P. 480; [1954] 2 All E.R. 550	*Appl.*	155, 157, 159
Shott *v.* Shott	[1952] 1 All E.R. 735; [1952] 1 T.L.R. 393	*R.*	66, 70
Sidney *v.* Sidney	36 L.J.P. & M. 73	*Appl.*	48, 68
Sifton *v.* Sifton	[1939] P. 221; 55 T.L.R. 339; [1939] 1 All E.R. 109	*R.*	319
Simpson *v.* Simpson	[1951] P. 320; [1951] 1 T.L.R. 1019	*R.*	200, 206
Simpson *v.* Simpson	[1951] P. 320; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 955	*R.*	360
Sinclair *v.* Sinclair	1 Hag.Con. 294		135
Slawson *v.* Slawson	[1942] 2 All E.R. 527; 167 L.T. 260; 86 S.J. 254		104
Slingsby *v.* Attorney-General	[1918] P. 236; 31 T.L.R. 246	*R.*	98

Smith, Hogg & Co. Ltd. *v.* Black Sea and Baltic General Insurance Co. Ltd.	[1940] A.C. 997; 56 T.L.R. 893; [1940] 3 All E.R. 405	*R.*	450
Société Anonyme Pêcheries Ostendaises *v.* Merchants' Marine Insurance Co.	[1928] 1 K.B. 750; 44 T.L.R. 270	*R.*	95
Solomons *v.* *R.* Gertzenstein Ltd.	[1954] 2 Q.B. 243; [1954] 1 All E.R. 1008		36
Spilsbury *v.* Spofforth	[1937] 4 All E.R. 487; 21 T.C. 247	*Appl.*	136, 144, 148–151
Spurgeon *v.* Spurgeon	46 T.L.R. 396		264
Squire *v.* Squire	[1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51	*R.*	25
Squire *v.* Squire	[1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51	*R.*	198
Squire *v.* Squire	[1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51	*R.*	358
Stanhope *v.* Stanhope	11 P.D. 103		29
Starkowski *v.* Attorney-General	[1954] A.C. 155; [1953] 3 W.L.R. 942; [1953] 2 All E.R. 1272		184
Statham *v.* Statham	[1929] P. 131; 45 T.L.R. 127	*R.*	253, 254
Stephen *v.* Stephen	[1931] P. 197; 47 T.L.R. 478	*Appl.*	48, 70, 71
Stevenson *v.* Stevenson	[1944] P. 52; 60 T.L.R. 267; [1944] 1 All E.R. 439	*R.*	302, 309
Stibbe *v.* Stibbe	[1931] P. 105		56
Stillwell, *In re*	[1916] 1 Ch. 365		35
Stokes *v.* Bennett	[1953] Ch. 566; [1953] 2 All E.R. 313	*R.*	142, 144, 151
Swan *v.* Swan	[1953] P. 258; [1953] 2 All E.R. 854		221
Swetland *v.* Curtiss Airports Corporation	1930 U.S.Av.R. 21; 1932 U.S.Av.R. 1		339
Symons *v.* Symons	[1897] P. 167; 13 T.L.R. 353	*R.*	450, 454, 455
Synge *v.* Synge	[1900] P. 180; 16 T.L.R. 388	*R.*	452
Tagart *v.* Tagart and White	50 T.L.R. 399	*R.*	85
Tangye *v.* Tangye	[1914] P. 201; 30 T.L.R. 649		328
Taylor *v.* Wenkenbach	[1921] P. 204		188
Teall *v.* Teall	[1938] P. 250; 54 T.L.R. 960; [1938] 3 All E.R. 349		317
Tennant's Application, *In re*	[1956] 1 W.L.R. 128; [1956] 1 All E.R. 425	*R.*	498
Thomas *v.* Thomas	[1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582	*R.*	277

Thomas *v.* Thomas	[1948] 2 K.B. 294; 64 T.L.R. 377; [1948] 2 All E.R. 98		223
Thomas *v.* Thomas	1947 S.C.(H.L.) 45	*R.*	358, 359
Thorne *v.* Rolff	2 Dyer 185a	*R.*	273
Thorogood *v.* Thorogood	The Times, Oct. 20, 1955	*R.*	495
Tickner *v.* Tickner	[1924] P. 118; 40 T.L.R. 367		445
Tilley *v.* Tilley	[1949] P. 240; 65 T.L.R. 211; [1948] 2 All E.R. 1113		221
Tilley *v.* Tilley	[1949] P. 240; 65 T.L.R. 211; [1948] 2 All E.R. 1113		302
Timmins *v.* Timmins	[1953] 1 W.L.R. 757; [1953] 2 All E.R. 187	*R.*	349
Tulip *v.* Tulip	[1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91		52
Turton *v.* Turton	3 Hag.Ecc. 338	*R.*	252
Tweney *v.* Tweney	[1946] P. 180; 62 T.L.R. 266; [1946] 1 All E.R. 564	*F.*	259, 267, 277
Usmar *v.* Usmar	[1949] P. 1; 64 T.L.R. 500	*R.*	198
Viney *v.* Viney	[1951] P. 457; [1951] 2 T.L.R. 705; [1951] 2 All E.R. 204		223
W—— *v.* H—— (orse. W——)	2 Sw. & Tr. 240		7
W. Y. *v.* A. Y.	1946 S.C. 27	*Appl.*	2, 13, 14
Waalstroom, The	17 Ll.L.Rep. 28		368
Wall *v.* Wall	[1950] P. 112; 65 T.L.R. 731; [1949] 2 All E.R. 927		418
Wallis *v.* Wallis	[1941] P. 69; 57 T.L.R. 523; [1941] 2 All E.R. 291	*R.*	145, 148, 150
Walls (J.) Ltd. *v.* Legge	[1923] 2 K.B. 240	*R.*	496
Walsham *v.* Walsham	[1949] P. 350; [1949] 1 All E.R. 774	*R.*	23
Wankie Colliery Co. Ltd. *v.* Inland Revenue Commissioners	[1921] 3 K.B. 344; 37 T.L.R. 738	*R.*	258
Warter *v.* Warter	15 P.D. 152; 6 T.L.R. 391	*R.*	191, 193
Warburton *v.* Warburton	The Times, July 10, 1953	*R.*	407
Ward *v.* Ward	The Times, Feb. 10, 1956; Court of Appeal Judgments, 1956, No. 40	*R.*	426
Waterhouse *v.* Waterhouse	[1893] P. 284	*Appl.*	27, 41–44
Waters *v.* Waters	[1956] P. 344; [1956] 1 All E.R. 432	*Appl.*	390, 409

Watkins, *In re*	[1953] 1 W.L.R. 1323; [1953] 2 All E.R. 1113	*Appl.*	259, 267, 270, 272, 277
Watt (or Thomas) *v.* Thomas	[1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582	*R.*	373
Watt or Thomas *v.* Thomas	[1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582	*R.*	448, 449
Weatherley *v.* Weatherley	[1947] A.C. 628; 63 T.L.R. 209; [1947] 1 All E.R. 563	*C.*	438, 453
Webster *v.* Webster and Williamson	[1926] P. 198	*R.*	84, 85
Welde *v.* Welde	2 Lee 580		9
Wells *v.* Wells	3 Sw. & Tr. 542	*R.*	309
Welton *v.* Welton	[1927] P. 162; 43 T.L.R. 174	*Appl.*	301, 304, 305, 308–311
White *v.* Altrincham U. D. C.	[1936] 2 K.B. 138; 52 T.L.R. 441; [1936] 1 All E.R. 923	*R.*	98
White (orse. Bennett) *v.* White	[1937] P. 111; 53 T.L.R. 442; [1937] 1 All E.R. 708	*R.*	118
White *v.* White	[1948] P. 330; 64 T.L.R. 332; [1948] 2 All E.R. 151	*R.*	24
Whiteside *v.* Whiteside	[1950] Ch. 65; 66 T.L.R. (Pt. 1) 126; [1949] 2 All E.R. 913	*R.*	144, 149
Whitmore *v.* Whitmore	L.R. 1 P. & M. 96	*R.*	305, 311
Wickins *v.* Wickins (No. 2)	[1918] P. 282; 34 T.L.R. 568		224
Williams *v.* Williams	[1929] P. 114; 45 T.L.R. 157		483
Wilson, decd., *In re*, Grace *v.* Lucas	[1954] Ch. 733; [1954] 1 All E.R. 997	*C.*	174, 178, 179
Wilson *v.* Glossop	19 Q.B.D. 379; 20 Q.B.D. 354; 4 T.L.R. 239	*R.*	233, 251
Wilson *v.* Glossop	19 Q.B.D. 379; 20 Q.B.D. 354; 4 T.L.R. 239	*R.*	306
Wily *v.* Wily	[1918] P. 1		105
Winona, The	77 Ll.L.Rep. 156		367
Wise *v.* Wise	[1944] P. 56; 60 T.L.R. 285; [1944] 1 All E.R. 446		6
Wood *v.* Wood	[1947] P. 103; 63 T.L.R. 450; [1947] 2 All E.R. 95	*R.*	164, 165
Woolgar, *In re*	[1942] Ch. 318; 58 T.L.R. 252; [1942] 1 All E.R. 583	*R.*	41
Woollard *v.* Woollard	[1955] P. 85; [1954] 3 All E.R. 351		197

Woollard *v.* Woollard	[1955] P. 85; [1954] 3 All E.R. 351	*R.*	407
Wyke *v.* Wyke	[1904] P. 149	*R.*	455
Young & Co. *v.* Royal Leamington Spa Corporation	8 App.Cas. 517	*R.*	256
Young *v.* Young and Kohler	[1955] 1 W.L.R. 395; [1955] 1 All E.R. 796	*Appl.*	155, 157

STATUTES JUDICIALLY CONSIDERED

1857

Matrimonial Causes Act, 1857 (20 *&* 21 *Vict.* *c.* 85), *s.* 22 - **Willmer J. and C.A. 115**

1882

Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17 - **Barnard J. 99**

1884

Disused Burial Grounds Act, 1884 (47 *&* 48 *Vict. c.* 72), *s.* 3
K. M. Macmorran Ch. 166
Willinck, Dean of Arches 336

1895

Summary Jurisdiction (*Married Women*) *Act*, 1895 (58 *&* 59 *Vict. c.* 39) (*as amended*), *ss.* 6, 7 - **Divl.Ct. and C.A. 217**

—— —— *s.* 7 - - - - **C.A. 283**

—— —— *ss.* 7, 10 - - - **Divl.Ct. 427**

1925

Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23) - **Barnard J. 174**

Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 21, 32 - **Willmer J. and C.A. 115**

1926

Indian and Colonial Divorce Jurisdiction Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 40), *s.* 1 (1) (*a*) (*b*) (*d*) - - **Karminski J. 181**

1934

Law Reform (*Miscellaneous Provisions*) *Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1)
Sachs J. 26

1937

Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 11 - **Divl.Ct. 438**

—— —— - - - - - **Divl.Ct. 458**

1938

Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1 (3) (4) - - - **Sachs J. 110**

1949

Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 1 (7) (*a*), 3*rd Sch.*
Sachs J. 87

—— —— *s.* 4 (3) - **Lord Merriman P. 470**

—— —— *s.* 15 (1) - - **Willmer J. 373**

—— —— 3*rd Sch.* - - - **Sachs J. 154**

1950

Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 1 (1), 13 (1) (4), 45 (1)
Barnard J. 174

—— —— *ss.* 10 (2), 13 (2) (*a*)
Karminski J. 76

Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 16 (1) (2) - **Sachs J. 414**

—— —— *ss.* 19, 26, 28 - **Sachs J. 26**

—— —— *s.* 19 - - **Lord Merriman P. 47**

—— —— *s.* 20 (1) - - - **C.A. 300**

—— —— *s.* 23 - - - **Willmer J. 326**

—— —— *s.* 25 - - - **Karminski J. 76**

1952

Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 205, 206 - **C.A. 136**

INDIA

1867

Indian Divorce Act, 1869 (*No. IV*), *s.* 57
Karminski J. 181

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Legal Aid (*Assessment of Resources*) *Regulations*, 1950 (*S.I.* 1950, *No.* 1358), *regs.* 1 (2), 9 (2), *Sch. I*, *Part I*, *para.* 2 (1) - - **Willmer J. 373**

—— —— *reg.* 2 - **Lord Merriman P. 470**

Legal Aid (*General*) *Regulations*, 1950 (*S.I.* 1950, *No.* 1359), *as amended by Legal Aid* (*General*) (*Amendment No.* 1) *Regulations*, 1954 (*S.I.* 1954, *No.* 166), *regs.* 8 (5), 11 (2A) (4)
Willmer J. 373

Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 840/*L*.4), *r.* 44 (1)
Lord Merriman P. 47

CASES

DETERMINED BY THE

PROBATE DIVORCE & ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

S. *v.* S. (ORSE. C.).

(Birmingham Assizes)
1954
July 19, 20;
Nov. 15, 16, 17, 26.

Karminski J.

Husband and Wife—Nullity—Incapacity—Curability—Impracticability of consummation—Relevant date. Wilful refusal to consummate—Nature of such refusal—Causation.

The true test of incapacity is the practical impossibility of consummation; the relevant date to be considered is that of the hearing, and not the presentation, of the petition.

A wilful refusal to consummate a marriage implies a conscious act of volition.

The consummation of a marriage was prevented by a curable defect in the wife, who remained a virgin. The husband suggested to the wife that she should see a doctor, but he did not take her to see one, and the wife did not consult one about the sexual difficulties which had frustrated the husband's attempts at penetration until after a petition for nullity of marriage upon the grounds of incapacity and wilful refusal had been served upon her in April, 1953. In July, 1954, the evidence of the parties was heard in a defended suit in which the wife by her cross-petition alleged adultery; in her evidence the wife expressed herself as perfectly willing to undergo the necessary operation. The husband in his evidence admitted his adultery. The case was adjourned for assistance in argument by the Queen's Proctor, and the wife underwent a hymenectomy before the further argument was heard. The result of that operation was to remove any impediment to consummation:—

Held, (1) that since the operation had rendered the wife physically capable of consummating the marriage, it could not be said that the consummation of the marriage had been practically impossible at the date when the evidence was heard. It might in the circumstances have become improbable; but the impractical and the improbable should not be confused. The petition therefore failed upon the issue of incapacity.

D——E v. *A——G* (1845) 1 Rob.Ecc. 279; *G——* v. *G——* (1871) L.R. 2 P. & M. 287; *Helm* v. *Helm,* Judgments of the Court of Appeal, 1954, No. 100, March 30, 31, 1954; *L.* v. *L.* (*orse. W.*) (1882) 7 P.D. 16; *W. Y.* v. *A. Y.*, 1946 S.C. 27 applied.

G. v. *G.* (*orse. K.*) (1908) 25 T.L.R. 328 distinguished.

(2) That although in certain circumstances the refusal of a wife who suffered from a defect to see a doctor or to have treatment might amount to a wilful refusal to consummate the marriage, the husband had not proved that in the present case the wife's failure to see a doctor had amounted to such a refusal: her conduct had been more consistent with a state of indecision. A mere neglect to comply with a request was not necessarily the same as a refusal. The petition for nullity therefore failed on the ground of wilful refusal also.

Horton v. *Horton* [1947] W.N. 3; 64 T.L.R. 62; [1947] 2 All E.R. 871; and *Dickinson* v. *Dickinson* [1913] P. 198; sub nom. *D.* v. *D.* (*orse. P.*) 29 T.L.R. 765 applied.

(3) That the wife was therefore entitled to a decree nisi of divorce upon the ground of the husband's admitted adultery.

Per curiam. (*a*) There is no essential difference between the law of England and Scotland as regards nullity on the ground of incapacity.

Observations in *Harthan* v. *Harthan* [1949] P. 115; [1948] 2 All E.R. 639 applied.

(*b*) Incapacity and wilful refusal cannot be construed as concurrent causes of a failure to consummate: it is necessary for the court to ascertain the cause, although that cause may be wilful refusal even where the spouse in fault is incapable. Observations of Denning L.J. in *Morgan* v. *Morgan* [1949] W.N. 250 not followed.

(*c*) Wilful refusal, as a ground for relief, must have persisted up to the date of the presentation of the petition: *Horton* v. *Horton,* 64 T.L.R. 62 applied.

NULLITY petition.

The following statement of facts is taken from the judgment: On January 19, 1949, the petitioner husband and the respondent wife went through a ceremony of marriage at Birmingham. By his petition, filed on April 9, 1953, the husband alleged that the marriage was never consummated by reason of the incapacity of the wife: he alleged in the alternative that the wife had wilfully refused to consummate the marriage. By her answer, which she filed on November 10, 1953 (an earlier answer had been struck out by reason only of a technical defect), the wife did not admit non-consummation and asserted that her only physical abnormality was a hymenal stenosis with a thickened hymenal membrane. She further alleged that if such abnormality had been an impediment to consummation it was and had been at all material times removable by a simple surgical operation which she was and had at all material times been ready to undergo. The wife by her answer also alleged that the husband was not entitled to relief by reason of insincerity, and because he had approbated the marriage. During the course of the hearing the defences of insincerity and approbation were dropped. The wife further asserted that if the marriage had not been consummated it was due to the incapacity or wilful refusal of the husband, and she claimed a decree of nullity on those alternative grounds. It became apparent when the evidence was heard that those cross-charges could not be sustained and they, too, were abandoned.

By her cross-petition the wife alleged adultery by the husband with a Mrs. N. from about September, 1952, until the date of the answer, and prayed for a decree of dissolution on the grounds of such adultery. The husband by his reply joined issue on the allegations contained in the answer and denied the allegations contained in the cross-petition. In the course of his evidence, however, he expressly admitted that he had committed adultery with Mrs. N.; that she had borne him a child as the result of the adulterous intercourse, and that he was, in fact, still living with her at the time he gave evidence in July, 1954.

The area of dispute between the parties was comparatively small, but where differences existed the evidence of the husband, who was considered to be a more reliable and convincing witness, was preferred in general by the court.

At the time of the ceremony of marriage in 1949 the husband was aged 23 and the wife 30. They had been courting for some time prior to the marriage, but both were without sexual experience. When the medical inspector of the court examined the wife in December, 1953, she was, in his view, without any doubt, a virgin, and there was no doubt that up to the time the parties separated in September, 1952, the marriage had never been consummated. At the time of the marriage the husband was a student nurse, later qualifying as a state registered nurse, and later still obtaining a special diploma in mental nursing. The wife, whose mother had died when she was about eight years of age, had thereafter lived with and been brought up by some maiden aunts in Birmingham, though she maintained contact with her father, who had re-married.

Immediately after the marriage the husband attempted to consummate the marriage; the wife was found by the court to have been not only anxious to consummate the marriage, but to bear children. The medical evidence made it clear that, in spite of genuine efforts on both sides, all attempts at consummation failed. The court found that the husband was perfectly capable, but that the cause of the failure to consummate was due to the structure of the wife's parts.

At some time in the latter part of 1949 the husband first suggested to the wife that she should see a doctor and obtain medical advice. According to his evidence, which was accepted, the wife did nothing, saying that the husband was effecting penetration. The wife denied that the husband told her about this time to consult a doctor, but the husband's version of this part of the case was preferred. Attempts to consummate the marriage continued, but with equal lack of success, during 1950. The husband's evidence that he had twice during that year asked the wife to see a doctor was accepted. At that time he thought that either his wife was too small or that his own person was too large, and his suggestion that the wife should see a doctor did not appear to be communicated in any very definite manner. He himself expressed it as being offered in a round-about way, pointing out that unless something was done the marriage was never going to be consummated. In 1951 the situation continued much as before. Attempts at consummation, though perhaps less frequent, were certainly wholly unsuccessful. The husband's evidence was again accepted, that on two occasions that year he asked his wife to see a doctor. He did not offer to take the wife to see a doctor, or to go to a doctor himself, or to see her own doctor. In fact, the wife had been under the care of her family doctor, Dr. L., for 25 years. The husband never saw a doctor at all; the wife, though she consulted Dr. L. from time to time on other matters, did not, in fact, consult him about her sexual difficulties until April 22, 1953, soon after the present petition had been served upon her.

In 1952 the general position between the parties rapidly deteriorated. The frustration which was caused by the attempts and by the failures at sexual intercourse set up a mutual irritation which became more acute as the year went on. In June, 1952, the wife consulted her doctor about some menstrual difficulties which led her to suspect that she might possibly be pregnant. Her suspicion of pregnancy was found to be mistaken, but it did not appear that on that occasion she was examined as to her sexual parts. On September 11, 1952, the wife left the husband and never returned to cohabitation with him. On November 7, 1952, she obtained an order from the Birmingham justices on the grounds that the husband had deserted her, and an order was accordingly made for her maintenance. In the autumn of 1952 the husband commenced an adulterous association with Mrs. N. which resulted in her child being born in May, 1953. The husband and Mrs. N. had lived together as husband and wife since April, 1953.

On being served with the petition the wife at last consulted Dr. L. He examined her and found her to be a perfectly healthy woman, who was co-operative on examination and showed no signs at all of frigidity or hysteria during his examination of her sexual parts. Dr. L. found her, however, to be abnormal only in the thickness of her hymen, which, in his view, could be corrected by a minor surgical operation. The doctor was unfortunately himself ill at the time of the hearing at Birmingham and was unable to appear in court, but an affidavit sworn by him setting out the above facts was accepted. He further expressed the opinion that if the husband had in the early days been more persistent in his efforts to consummate there was a bare possibility that by intercourse he could have penetrated the wife's hymen. That possibility was considered by the court to be too uncertain to be practical. The evidence of Dr. L. was in accordance with that given by the medical inspector appointed by the court, who had examined the parties on December 14, 1953. He found the husband apparently capable, but found that the wife had a hymen of such an unusually thick and resistant nature that it constituted an effective barrier to penetration. The medical inspector, like Dr. L., found no signs of hysteria or frigidity in the wife, but took the view that the hymen could be dealt with by a simple surgical operation, with no danger to her life or health. Their views were reinforced at the hearing by that of a gynaecological surgeon at the Birmingham United Hospital. He examined the wife on July 17, 1954, and expressed the view that there was no reason why, if the operation of hymenectomy was performed upon her, she should not thereafter become perfectly normal and able to consummate the marriage.

When she gave evidence at the hearing on July 19, 20, 1954, the wife said that she was perfectly willing to undergo the operation indicated by the medical evidence, but that she had been advised by her solicitors that it was not desirable for her to submit to such an operation pending the hearing of the suit. The evidence and some of the argument having been heard at the Birmingham Summer Assize, the case was adjourned for subsequent argument in London, and the assistance of the Queen's Proctor under section 10 of the Matrimonial Causes Act, 1950, was invited in view of the unusual nature of the case. While the case was awaiting argument (which was heard in London) the wife submitted herself on October 15, 1954, to the operation of hymenectomy. This was successfully performed by the gynaecological surgeon, who swore an affidavit on October 22, 1954, saying that, in his view, there remained no impediment on the wife's part to a full consummation of the marriage. The expression of opinion given by the surgeon in his affidavit was accepted.

Colin Duncan for the Queen's Proctor. The essential question here is that of incapacity. The test of incapacity is to be found in *G.* v. *G.*,[1] where a decree of nullity was granted to the husband although there was no malformation or structural defect in the wife: is consummation between the parties "practically impossible"? "The basis of the interference of the court is not the "structural defect, but the impracticability of consummation." *G.* v. *G.*[1] was recently considered and applied by the Court of Appeal in *Helm* v. *Helm.*[2] It may not matter which party is to blame: *Harthan* v. *Harthan*,[3] *G.* v. *G.*,[4] *H.* v. *H.*,[5] and the incapacity may be due to either physical or psychological causes: *G.* v. *G.*,[6] *Wise* v. *Wise.*[7] But "the impediment must be shown "to have existed at the marriage, and to be incurable": *Brown* v. *Brown*[8] (where the impediment was not proved incurable); although it would seem that it is no longer necessary formally to plead incurability: *F.* v. *P.*,[9] *Dickinson* v. *Dickinson* (*orse. Phillips*).[10]

Such incurability will be found (*a*) where there is medical evidence to that effect; (*b*) where a congenital malformation is not "absolutely irremovable, but any attempt to remove it "would be attended with considerable danger to the life of the

---

[1] (1871) L.R. 2 P. & M. 287, 291–2.

[2] Court of Appeal Judgments, 1954, No. 100.

[3] [1949] P. 115, 130; [1948] 2 All E.R. 639.

[4] [1912] P. 173; 28 T.L.R. 481.

[5] (1929) 45 T.L.R. 618.

[6] [1924] A.C. 349; sub nom. *Graham* v. *Reith or Graham*, 40 T.L.R. 322.

[7] [1944] P. 56, 57; 60 T.L.R. 285; [1944] 1 All E.R. 446.

[8] (1828) 1 Hagg.Ecc. 523.

[9] (1896) 75 L.T. 192, 193.

[10] [1913] P. 198; 29 T.L.R. 765.

"woman": *W*—— v. *H*—— (*falsely called W*——).[11] See also *G.* v. *G.* (*orse. K.*),[12] considered in *Harthan* v. *Harthan*[13]; (*c*) where the respondent refuses to submit to an operation: *L.* v. *L.*[14] (where the operation would not have involved great risk to life), *W. Y.* v. *A. Y.*,[15] *H.* v. *H.*[16]

But if the petitioner establishes that consummation was impossible at the time of the ceremony of marriage, and the evidence shows (1) that the condition was not incurable, and (2) that the respondent is willing to undergo an operation, even at the last moment, the petition must fail, as in the Scots case of *W. Y.* v. *A. Y.*,[17] where the Lord Ordinary, after considering the proof of the wife defender (who stated at the hearing for the first time that she was willing to undergo an operation) had continued the case "'to allow of the defender undergoing such "'treatment as her medical adviser may recommend as being "'calculated to remove her incapacity,'" and the husband unsuccessfully reclaimed against the course directed. It is submitted that the decision in that case, which is directly in point, should be followed, as in questions of incapacity the principles in English and Scots law are the same. See also *H.* v. *H.*,[18] where a decree was refused to a wife in an undefended action in which she relied on her own incapacity because she had not proved that her condition was irremediable.

J. E. S. Simon Q.C. and *Philip Cox* for the husband. The marriage was not consummated because of the wife's disability. The evidence, it is submitted, shows that she refused to see a doctor while living with her husband in spite of his requests; when she left him there were therefore two concurrent causes of non-consummation—the obstruction and her refusal to take those steps without which the defect could not be cured.

Wilful refusal to consummate a marriage need not be a refusal in terms, as where the guilty party has left the other immediately after the marriage ceremony. By refusing to see a doctor and take steps to have her incapacity cured, the wife here evinced a refusal to consummate even though she had submitted to her

---

[11] (1861) 2 Sw. & Tr. 240, 245.

[12] (1908) 25 T.L.R. 328.

[13] [1949] P. 115, 138–9.

[14] (1882) 7 P.D. 16.

[15] 1946 S.C. 27, 30.

[16] 1949 S.C. 587, 590–1.

[17] 1946 S.C. 27. It was held that "Where the evidence in an action "of nullity of marriage based on "impotency establishes a reasonable "prospect that the impotency of the "defender can be remedied by medical "treatment, the defender, if willing to "undergo that treatment, is entitled "to an opportunity of doing so, "notwithstanding that the offer to "undergo treatment is made for the "first time in the course of the proof "of the action."

[18] 1949 S.C. 587.

1954

S. *v.* S. (ORSE. C.).

husband's attempts, which had been those of a reasonable man; for she had become aware of the obstruction yet refused to have the necessary treatment. She was therefore guilty of a wilful refusal to consummate the marriage.

The relevant date in cases of wilful refusal is that of the presentation of the petition; but in any event the operation which the wife had undergone during the course of the proceedings was a mere tactical move. She had, moreover, left her husband, thereby effectively preventing further attempts on his part, and had presented a petition for divorce on the ground of his adultery which acted as a further barrier; and since the operation she had indeed made no offer to consummate the marriage.

The refusal to have treatment was a continuation of the "incurability"; it is submitted that incapacity and wilful refusal may be concurrent causes of failure to consummate, and that neither need be the sole cause: see judgment of Denning L.J. in *Morgan* v. *Morgan.*[19] Although "the common area covered "by suits for nullity on the grounds respectively of incapacity "and of wilful refusal to consummate is very small" (*Baxter* v. *Baxter*[20]), it is not non-existent.

Failure to comply with a request may be wilful refusal. [*In re Quintin Dick,*[21] *Crears* v. *Hunter*[22] and *In re Mills' Trusts*[23] were referred to.] The wife here by her refusal to take medical advice before proceedings had begun showed, in the terms in *Horton* v. *Horton,*[24] "a settled and definite decision come to "without just excuse" not to consummate the marriage.

In cases of incapacity the relevant date is also that of the presentation of the petition. "Curability" is a legal fiction; but if the wife is to be regarded as curable she must be curable at the date of the petition, and she could not be regarded as curable at that time because she would not see a doctor and therefore could not have the operation.

The Scots authorities which have been cited should not be followed in view of fundamental differences between the two systems; moreover, they conflict with *G.* v. *G.* (*orse. K.*),[25] for the wife was there granted a decree although she had refused to undergo a minor operation to make herself apta to her husband,

---

[19] [1949] W.N. 250.

[20] [1948] A.C. 274, 285–6; 64 T.L.R. 8; [1947] 2 All E.R. 886.

[21] [1926] Ch. 992, 1000; 42 T.L.R. 681.

[22] (1887) 19 Q.B.D. 341, 345.

[23] (1888) 40 Ch.D. 14.

[24] 64 T.L.R. 62; [1947] 2 All E.R. 871; [1948] W.N. 3, 4.

[25] 25 T.L.R. 328.

and *L.* v. *L.*,[26] where it was thought that an operation on the wife respondent might have proved successful.

But even if the situation at the time of judgment is the one to be considered, the operation had only been performed at a time when consummation had in the circumstances become, in the terms of the judgment in *G.* v. *G.*,[27] "practically impossible." [Reference was also made to *In re Eaves.*[28]]

G. C. Tyndale Q.C. and *C. A. Beaumont* for the wife. The wife was incapable up to the date of the petition; she could not be said to have refused to do that which she was incapable of doing. The evidence moreover shows that she had never reached a firm decision never to have treatment, and although the husband suggested that she might see a doctor, he failed to take positive steps. His sexual advances were never refused. He cannot in such circumstances establish that the wife had been guilty of a "wilful, determined and steadfast refusal" to consummate the marriage. [*Dickinson* v. *Dickinson* (*orse. Phillips*) [29] was referred to.]

Incapacity and wilful refusal are mutually exclusive, and it is submitted that the observations of Denning L.J. in *Morgan* v. *Morgan* [30] were obiter and should not be followed. A guillotine does not fall in cases of incapacity when proceedings in nullity are begun: see *D——E* v. *A——G* (*orse. D——E*),[31] where the hearing was adjourned for further medical evidence to ascertain if the wife's defects were curable. [*Welde* (*alias Aston*) v. *Welde* [32] and Latey on Divorce, 14th ed., at p. 198, were also referred to.]

Colin Duncan in reply. The principles in cases of incapacity in English and Scots law are the same: *Harthan* v. *Harthan* [33]; and it is submitted that *G.* v. *G.* (*orse. K.*) [34] was decided upon the exceptional circumstances in that case and does not conflict with the Scots decisions. (The court file of *G.* v. *G.* (*orse. K.*) [34] was sent for and produced.)

The test in cases of incapacity is this: is the defect remediable when the case is heard? The operation need not have been performed when the petition is presented. The court cannot, however, insist on an operation, and if the respondent refuses it, then consummation is "practically impossible." But the test

---

[26] 7 P.D. 16.

[27] L.R. 2 P. & M. 287, 291–2.

[28] [1940] Ch. 109; 56 T.L.R. 110; [1939] 4 All E.R. 260.

[29] [1913] P. 198, 204.

[30] [1949] W.N. 250.

[31] (1845) 1 Rob.Ecc. 279.

[32] (1731) 2 Lee 580.

[33] [1949] P. 115, 145.

[34] 25 T.L.R. 328.

1954

S. *v.* S. (ORSE. C.).

of practical impossibility implies consideration of the question whether it is remediable. [The Canadian case of *C.* v. *C.*[35] was referred to, where the hearing was adjourned to see if arrangements could be made for the wife to have a small operation, which she was willing to undergo, and the petition was later dismissed because the husband's attitude as to choice of surgeon was found insincere.]

In cases of wilful refusal, however, it is accepted that the material date is that of the presentation of the petition, and it is further accepted that a persistent refusal to have remedial treatment could amount to wilful refusal. But the evidence does not show such a refusal here. [The definition of wilful refusal in Rayden on Divorce, 6th ed., at p. 95, was referred to.]

The observations cited from *Morgan* v. *Morgan*[36] should not be followed.

[Reference was also made to *S. G.* v. *W. G.*,[37] *McM.* v. *McM.; McK.* v. *McK.*[38] and *F.* v. *F.*,[39] in which *G.* v. *G.* (*orse. K.*)[40] had been referred to, and to the Canadian cases of *B.* v. *B.*[41] (respondent wife's refusal to undergo operation) and *Burton* v. *Burton.*[42]]

J. E. S. Simon Q.C. replied.

Cur. adv. vult.

KARMINSKI J., reading his judgment, stated the facts and said that he desired to express his gratitude to counsel for the assistance given by them in argument. His Lordship continued: On these facts I have to decide whether or not a failure to consummate the marriage was due to the incapacity of, or the wilful refusal by, the wife. Mr. Simon argued that incapacity and wilful refusal can be concurrent causes of a failure to consummate, and founded his argument on this matter on some observations of Denning L.J. as reported in *Morgan* v. *Morgan*,[1] Mr. Simon agreed that these observations were unnecessary to the decision of the case and therefore obiter. Denning L.J. is reported to have said: " The wilful refusal of the wife to consummate the marriage was a cause—one of the causes—of the marriage not having been consummated. It was not necessary that it should be the sole cause. It might be that there was another cause, viz., the impotence of the husband;

---

[35] [1949] 1 W.W.R. 911.

[36] [1949] W.N. 250.

[37] 1933 S.C. 728, 735.

[38] [1936] I.R. 177, 182.

[39] 1945 S.C. 202.

[40] 25 T.L.R. 328.

[41] [1944] 3 W.W.R. 113.

[42] [1945] 3 W.W.R. 1.

[1] [1949] W.N. 250.

"but that did not matter." Bucknill and Asquith L.JJ. appear to have been silent on this point, and I do not consider myself to have been bound by the observations of Denning L.J. In my view, it is necessary for the court to ascertain the cause of non-consummation, though I accept that the cause may be wilful refusal even where the spouse in fault is incapable. Thus an impotent spouse may effectively prevent consummation by a steadfast refusal to allow even an attempt to consummate the marriage. But it must be remembered that the common area covered by suits for nullity on the ground respectively of incapacity and wilful refusal is very small: *Baxter* v. *Baxter*.[2]

I propose, therefore, to deal separately with the questions of incapacity and wilful refusal. The true test of incapacity is the practical impossibility of consummation. In *G*—— v. *G*——[3] Lord Penzance stated the proposition as follows: "The invalidity "of the marriage, if it cannot be consummated on account of some "structural difficulty, is undoubted; but the basis of the interference of the court is not the structural defect, but the "impracticability of consummation. If, therefore, a case presents "itself involving the impracticability (although it may not arise "from a structural defect) the reason for the interference of the "court arises. The impossibility must be practical. It cannot "be necessary to show that the woman is so formed that "connection is physically impossible if it can be shown that it "is possible only under conditions to which the husband would "not be justified in resorting. The absence of a physical "structural defect cannot be sufficient to render a marriage valid "if it be shown that connection is practically impossible, or even "if it be shown that it is only practicable after a remedy has "been applied which the husband cannot enforce, and which the "wife, whether wilfully or acting under the influence of hysteria, "is determined not to submit to." In *Helm* v. *Helm*[4] the Court of Appeal followed and applied this test. Singleton L.J. stated the proposition as follows: "That shows the necessity of proving "that which I stated a moment ago, that the disability alleged "is incurable or such as to make consummation practically "impossible." A spouse must be regarded as incurable if the condition can be remedied either by an operation attended by danger, or if the spouse at fault refused to submit to an operation. In *D*——*E* v. *A*——*G* (*orse. D*——*E*)[5] there was evidence that a further operation on a wife could not be performed without danger to her life, and Dr. Lushington found that she was practically incapable of consummating the marriage. In *L.* v. *L.* (*orse. W.*)[6] Sir James Hannen P. found that the marriage had not been consummated through the incapacity of the wife. He added these words: "The difficulty might perhaps be overcome "if the lady would undergo an operation, which would probably "be successful. But the court cannot compel her to submit, "and the man can only be expected to take all reasonable means "to persuade her. This he has done, and she has distinctly "refused. I therefore make a decree nisi for nullity of the "marriage."

---

[2] [1948] A.C. 274, 285–6.

[3] (1871) L.R. 2 P. & M. 287, 291.

[4] Court of Appeal Judgments, 1954, No. 100.

[5] (1845) 1 Rob.Ecc. 279, 303.

In the present case the wife is no longer incapable of consummation since the operation recently performed on her has now rendered her physically capable of consummation. Nor can it now be said that she has refused to submit to an operation, since she has, in fact, though belatedly, submitted to it. But Mr. Simon has argued that she submitted to the operation too late, describing her submission as a tactical move and one not undergone bona fide with the object of achieving a consummation of her marriage with the husband. He submitted that if the wife is to be regarded as curable she must, in fact, be curable at the date of the presentation of the petition; in the present case he said the wife was not so curable, because she had refused to see a doctor or to undergo treatment prior to the presentation of the petition. I do not think that this argument is supported by authority. In *D——E* v. *A——G* (*orse. D——E*)[7] Dr. Lushington adjourned the hearing for further medical evidence to ascertain whether the wife's defects were incapable of cure. At the resumed hearing evidence was given that any further operation might be dangerous and would probably be unsuccessful. The reasons for the further inquiry were set out by Dr. Lushington in the following terms[8]: "There is, I think, "some ambiguity in the evidence. The two witnesses are "both agreed as to the connexion being imperfect; but I am "not satisfied as to the true meaning of their evidence as "to incurability. In one sense of the term, there can be no "doubt, namely, that as relates to conception, the malformation "is incurable; but it is to me doubtful, whether they mean "that it is incurable as to the mere coitus. In this difference,

---

[6] (1882) 7 P.D. 16.
[7] 1 Rob.Ecc. 279.
[8] Ibid. 298–9.

"I think, lies the true distinction. If there be a reasonable "probability that the lady can be made capable of a vera "copula—of the natural sort of coitus, though without power "of conception—I cannot pronounce this marriage void." This passage was quoted with apparent approval in the opinion of Lord Jowitt L.C. in *Baxter* v. *Baxter*.[9]

The nearest decision on the facts to the present case is *W. Y.* v. *A. Y.*[10] In that case the Lord Ordinary (Lord Sorn) adjourned a suit for nullity on the ground of incapacity after hearing evidence from a doctor that the respondent wife might have her condition remedied by treatment and on the respondent's own evidence that she was willing to undergo treatment. In that case the respondent wife had up to the date of the hearing refused or neglected to submit to treatment. The husband in the case appealed to the Inner House against the course directed by the Lord Ordinary. The Inner House upheld the decision of the Lord Ordinary, the Lord President (Lord Normand) stating that when the question has arisen whether a state of impotency existing at the date of the marriage and continuing to the date of the action, is remediable, the court has not dealt with it without consideration of future medical or surgical treatment which might remove the cause of the disability. Lord Moncrieff, in concurring, said this[11]: "If "incapacity is only temporary and subject to cure after appro- "priate treatment, then there is no reason for annulling a "marriage." With these views Lord Carmont and Lord Russell agreed. Mr. Simon contended that authorities dealing with questions of incapacity under Scots law are not even of persuasive authority in England, by reason of the fundamental differences between the two systems and their historical divergences. In *Harthan* v. *Harthan*[12] a similar argument appears to have been addressed to the court on behalf of the King's Proctor by Mr. Simon. Lord Merriman P. dealt with his submission in these terms[13]: "Conversely it was argued by Mr. Simon that "no attention should be paid to this decision (*F.* v. *F.*)[14] "because of the greater authority of the canon law in Scotland. "It is indisputable that there are divergences between the laws "of the two countries in relation to divorce. The case of deser- "tion is the clearest example, and others are to be found in "connexion with condonation, collusion and connivance. But

---

[9] [1948] A.C. 274, 285–6.
[10] 1946 S.C. 27.
[11] Ibid.
[12] [1949] P. 115.
[13] Ibid. 145.
[14] 1945 S.C. 202.

"counsel was unable to point to any essential difference in the "law of the two countries as regards nullity and, as has already "been seen, it is well settled in both countries that impotence "merely renders a marriage voidable and not void." I think that these observations were material to the decision in *Harthan* v. *Harthan* [15] and are therefore binding on me. But in any event I would express my entire and respectful agreement with them.

Mr. Simon further argued that the Scots cases, of which I have only referred to *W. Y.* v. *A. Y.*,[16] are inconsistent with the decision of the English Court of Appeal in *G.* v. *G.* (*orse. K.*).[17] That case, which is somewhat briefly reported, decided that a wife might obtain a decree of nullity on the ground of her husband's incapacity though she herself was too small in relation to the husband who was himself unusually large and even though she refused to undergo a minor operation to make herself apta to her husband. The Court of Appeal decided that it would not be right to insist upon the wife undergoing the operation suggested, perhaps because the medical evidence showed her to be apta to a man of ordinary size. In my view, *G.* v. *G.* (*orse. K.*) [17] was decided on the facts peculiar to that particular case, and the decision of the Court of Appeal conflicted neither with *W. Y.* v. *A. Y.*[18] nor with the earlier English authorities to which I have referred, namely, *D——E* v. *A——G* (*orse. D——E*) [19] and *L.* v. *L.* (*orse. W.*).[20]

Applying the principles discussed above, I have asked myself this question: was the consummation of the marriage between the husband and the wife practically impossible at the date of the hearing of this suit in July, 1954? The answer to that question must be, no. At that hearing the wife said that she was willing to undergo an operation, and she did, in fact, subsequently undergo it. It is true that consummation is now improbable, but that is at least due in part to the fact that the husband is living with another woman; but the impractical and the improbable must not be confused, since I have no reason to believe that the wife would refuse an attempt to consummate the marriage if the husband left the woman named and offered to start married life afresh with the wife. I find, therefore, that the husband has failed to satisfy me that the marriage has not been consummated owing to the incapacity of the wife.

---

[15] [1949] P. 115.
[16] 1946 S.C. 27.
[17] (1908) 25 T.L.R. 328.
[18] 1946 S.C. 27.
[19] 1 Rob.Ecc. 279.
[20] 7 P.D. 16.

I turn now to the issue of wilful refusal. Section 8 (i) (*a*) of the Matrimonial Causes Act, 1950, says that a marriage shall be voidable on the ground (inter alia) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage. It was accepted by counsel, and I agree, that the wilful refusal must have persisted up to the date of the presentation of the petition. In *Horton* v. *Horton*[21] Lord Jowitt L.C. expressed the view that it was not desirable to attempt any definition of the phrase "wilful refusal to consummate the marriage." He added, however, these words[22]: "The words connote, I think, a settled and definite decision "come to without just excuse, and, in determining whether there "has been such a refusal, the judge should have regard to the "whole history of the marriage." In *Dickinson* v. *Dickinson*[23] Sir Samuel Evans P. found that wilful and persistent refusal to allow any marital intercourse is a sufficient ground for a decree of nullity of marriage. This decision, which anticipated the passing of the Matrimonial Causes Act, 1937, by over 20 years, was subsequently overruled by the Court of Appeal in *Napier* v. *Napier*,[24] but the judgment of Sir Samuel Evans P. remains of great interest. He said this of wilful refusal[25]: "By "wilful refusal I do not mean a mere temporary unwillingness "due to a passing phase, or the result of coyness, a feeling of "delicacy, affected or real, or a nervous ignorance which might "be got rid of or cured by patient forbearance, care, and kindness; but a wilful, determined, and steadfast refusal to perform "the obligations and to carry out the duties which the matrimonial contract involves."

Mr. Simon argued that if the respondent refuses to have treatment, such refusal should be treated as wilful refusal. Mr. Duncan conceded that if a wife refused all attempts to get her to have treatment it could be treated as wilful refusal. Whether or not a refusal to have treatment could amount to wilful refusal must, I think, depend upon the particular facts and history of each case, and in this case I must consider the history of the marriage as a whole. Here the pleadings in the suit themselves show that at the time when they were filed the parties and their advisers were in some considerable doubt as to the real nature and effect of the disabilities which had hitherto impeded consummation. It was unfortunate that the wife did not see

---

[21] 64 T.L.R. 62.

[22] [1947] 2 All E.R. 871, 874.

[23] [1913] P. 198.

[24] [1915] P. 184; 31 T.L.R. 472.

[25] [1913] P. 198, 204.

1954

S. *v.* S. (orse. C.).

Karminski J.

a doctor before April, 1953, and indeed, I think that she was unwise in that respect. It was equally unfortunate that the husband failed to take more positive steps to persuade her to see a doctor or to see one himself. But the failure of the wife to see a doctor or to subject herself to treatment is, in my view more consistent with a state of indecision than with a settled or definite decision. Mere neglect to comply with a request is not necessarily the same as a refusal. A refusal implies a conscious act of volition; neglect may be no more than a failure or an omission to do that which has been suggested. See *In re Quintin Dick.*[26]

In petitions based on wilful refusal a petitioner must prove that the marriage has not been consummated owing to the wilful refusal of the respondent. If the petitioner fails to prove this he has failed to do what the section requires: see *Horton* v. *Horton.*[27] In this case the husband petitioner has failed so to satisfy me, and I find against him on the issue of wilful refusal. In the result, I must reject both the prayer in the petition and the prayer in the answer. There remains the wife's cross-petition on the grounds of the husband's adultery. I am satisfied that the husband's adultery has been proved as alleged in the cross-petition, and I pronounce a decree nisi of dissolution on the grounds of adultery.

Prayer of answer to nullity petition rejected; petition dismissed.
Decree nisi of divorce on wife's cross-petition.

Solicitors: *Dennes & Co. for Harvey, Mabey & Walker, Birmingham; Shelton, Cobb & Co.; Queen's Proctor.*

J. B. G.

---

[26] [1926] Ch. 992.

[27] 64 T.L.R. 62.

1955
Apr. 1, 4.

Mr. Commissioner Latey Q.C.

FORBES *v.* FORBES.

Husband and Wife — Divorce — Cruelty — Contraceptives — Wife's deliberate refusal to have children—Insistence on contraception—Knowledge of injurious effect on husband—No fear of childbirth.

During a period of some eight years' cohabitation a wife, who on her own admission before justices had no fear of childbirth, consistently refused, with the object of avoiding conception, to allow her husband to have free intercourse, and insisted on precautions which were obnoxious to him. The husband's health was affected:—

Held, that the wife, who was well aware of the effect of her conduct upon her husband, had treated him with cruelty.

Fowler v. *Fowler* [1952] 2 T.L.R. 143 distinguished.

UNDEFENDED PETITION for divorce by a husband.

The following facts are extracted from the judgment:

The marriage took place on November 10, 1945, at St. Luke's Church, South Lyncombe, near Bath. The husband had served as a lieutenant-commander, R.N.V.R., during the war, and had returned to duties at the Admiralty. He and his wife had first met in 1939, and had become engaged to be married during the war. While he was away at sea she wrote him affectionate letters. She had never raised any objection to having children when they discussed the matter, and she knew that he was particularly fond of children. She was an artist of considerable talent, and had exhibited pictures in the Royal Academy.

In the events which had happened, some significance must be attached, as showing her state of mind, to one or two phrases in letters which she wrote to him before they were married. In a letter written on August 21, 1944, the wife had suggested separate bedrooms after the marriage; and on September 26, 1944, she wrote: "When I was younger I thought physical attraction was "the chief thing, but now I am older I find mental companion-"ship so much more." At that time she used to sign herself "Buttercup" in writing to him. On April 25, 1945, she wrote: "What do you mean, my sweet, by saying there is only one "thing you want *more* than to see me and that is a little "'Buttercup'?" Later, in this same letter, she wrote: "I'm "terrified of getting married. I suppose I will get over it eventu-"ally." On July 27, 1945, she wrote to him: "No, my sweet, "I'm not thinking of marrying anyone else! I'm the kind that "can always be contented because I can always interest myself, "especially in painting; whereas other girls (like Chris) have "no interest that can be used in a home except nursing, and I "suppose having a baby would be her natural bliss—and through "not having one she is restless. The food is too poor to have "one anyway. But painting is my baby—of course I have always "liked the company of men—but *only* the company!!! except in "your case! Yes, I'm lucky to be interested in painting because "it is creative, and only creative work uses up the energy "properly, or as nearly as possible."

After the marriage the parties discussed the question of having children. The wife said that the time to have a child was between the age of 35 and 40. He disagreed, and at intervals he tried to persuade her to his way of thinking. The wife maintained an evasive attitude, and gave various and inadequate excuses, especially that she did not want a baby while they continued to live at her mother's house, where they had been occupying twin beds at her instigation; but she agreed to submit to free intercourse when they should have a home of their own. She avoided discussion on the subject as far as possible. After three years he pressed the matter. She put him off sometimes with taunts such as "You only want to prove your manhood," and "'Didums' want to be a father."

Meanwhile, the husband had reluctantly acquiesced in his wife's wish for him to use contraceptives; but after she had detected him in a subterfuge which might have rendered his ordinary precaution of no avail in avoiding conception, she resorted to the use of a female contraceptive device. This, in time, became repulsive to him and frustrated his sexual instincts. He reasoned with her, pointing out that this procedure was wrong, as the purpose of marriage should be procreation, or at least mutual love.

By 1950, owing to her refusal to have free intercourse, their relations had become strained. On every occasion when his natural instincts moved him the husband was faced with the same somewhat cold-blooded preparations of his wife. In that year his wife's sister gave birth to a baby, and he took advantage of the occasion to try to persuade his wife how happy it would be for both of them if she followed her sister's example. She refused. He tried, successfully, to enlist her mother's persuasions on his behalf, but this only aroused the wife's resentment. They went for a holiday in Brittany together, but further persuasions he made there proved futile.

In the summer of 1950 the husband had a short affair with another woman, and in respect of which the court was asked to exercise discretion. This affair was unknown to the wife.

In August, 1952, the husband and wife had a holiday together at San Sebastian, where he was laid up for a few days, and his wife went about alone. On their return to England she seemed distraught, and when he questioned her she burst into tears and said that she had fallen in love for the first time in her life with a man whom she had met in Spain.

In October, 1952, the husband anticipated being sent to a post at Bath, and he tried again to persuade her to become a wife in the full sense. She maintained that that must await a new home, a separate home.

In February, 1953, they stayed together for a while at a hotel or lodgings in Bath. They were there for a few weeks, and on one occasion he believed, as there had been no demonstration at all of his wife's usual preparations, that she had allowed him free intercourse. He later became convinced from the subsequent events, and the subsequent statements by the wife, that no such thing happened. On that occasion, when they were living together there, he again begged her to start a family. For the first time she definitely refused and said: "No, never, I want to "be free, to have my liberty." He was completely dumbfounded, as hitherto the main reason for her refusal had been the desire for a separate home. He told her that after all these years, years of putting him off, it was a cruel deceit on her part. He renewed his entreaties from time to time, reminded her of her marriage vows, but in vain. He was provoked into remarking to her: "I suppose you would prefer to have a baby by the man in "Spain," and she answered "Yes." He warned her that if she persisted in that course of conduct they would have to go their separate ways.

After a holiday together in the Western Highlands in September, 1953, during which there was no attempt at marital intercourse, she told him that she had seen a solicitor, was going to leave him, and was looking for a flat. Meanwhile, the husband had arranged to take a flat at Atworth, and in November, 1953, he began to live there. The wife had told him that she was still in love with the man in Spain.

That was the end of the married life, and she never joined him at Atworth.

On March 27, 1954, the husband's solicitors wrote to her giving notice that the flat in which they had been living, in London, must be given up, and that her husband did not propose to accept responsibility for her maintenance. They added: "Your refusal throughout the marriage to bear children led to "the increasing unhappiness and frustration of your husband "and, on June 11, 1953, to the complete breakdown of marital "cohabitation." The wife's solicitors, in reply, said: "I am "instructed that your client's allegation contained in your letter, "that his wife has throughout the marriage refused to bear "children, is quite untrue. It is, of course, a fact that there "have been no children of this union, but that, as I am "instructed, has not been the fault of my client, who has had "medical advice, and, according to my instructions, Mrs. Forbes "has throughout the marriage done everything in her power to "make the marriage a success. I am further instructed that "your client informed his wife that he had lost affection for her "and told her that she was too old and mature for him. It "appears from my instructions that he had wilfully refrained "from cohabitation with my client and has now apparently "decided to live elsewhere and to refuse legal responsibility for "her maintenance."

The wife then took out a summons before the Bath justices on the grounds of desertion and wilful neglect to provide reasonable maintenance, and the hearing took place on June 22, 1954. Her summons was dismissed, the justices holding that there had been a refusal of intercourse by the wife and an eventual agreement to separate. In the course of the proceedings the wife had stated that she was always prepared to have a child and had no fear of childbirth.

James Stirling for the husband. The course of conduct by the wife was such as to raise the irresistible inference that it was deliberate and intentional, and the facts are easily distinguishable from those in *Fowler* v. *Fowler*.[1] The reasoning of Hodson J. in *Cackett* (*orse. Trice*) v. *Cackett*[2] makes it clear that one does not have to look inside an offending spouse's mind to find intention or motive when making a finding of cruelty. Neither in *White* (*orse. Berry*) v. *White*[3] nor in *Walsham* v. *Walsham*[4] was there any statement of intention. The principles to be followed with regard to intention are clearly set out in the speeches of Lord Normand and Lord Merriman P. in *Jamieson* v. *Jamieson*.[5] Lord Merriman P. recalled that Shearman J. had put the matter succinctly in *Hadden* v. *Hadden*[6] when he said: "I do not "question . . . that he had no intention of being cruel . . . but ". . . his intentional acts amounted to cruelty." The observations of Denning L.J. in *Kaslefsky* v. *Kaslefsky*[7] do not detract from this view, and it is submitted that the recent decision of the Judicial Committee of the Privy Council in *Lang* v. *Lang*[8] supports that view. To sum up, if it is the proved intention of a spouse to pursue a course of conduct calculated to injure the other spouse, and such conduct does result in injury, then it amounts to cruelty.

---

[1] [1952] 2 T.L.R. 143.

[2] [1950] P. 253, 260; 66 T.L.R. (Pt. 1) 723; [1950] 1 All E.R. 677.

[3] [1948] P. 330; 64 T.L.R. 332; [1948] 2 All E.R. 151.

[4] [1949] P. 350; [1949] 1 All E.R. 774.

[5] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

[6] The Times, Dec. 5, 1919, p. 5, col. 3.

[7] [1951] P. 38, 46; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398.

[8] [1955] A.C. 402; [1954] 3 All E.R. 571.

The wife did not appear and was not represented.

MR. COMMISSIONER LATEY Q.C. In this case the husband, who is 36 years of age, prays for a divorce on the ground of the cruelty of his wife, who is about the same age. The suit is undefended, but Mr. Stirling, with his usual integrity, made it clear at the outset that the grounds put forward for relief required careful consideration.

The main ground of the husband's case is that his wife consistently refused, with the object of avoiding conception, to allow free intercourse, and insisted on precautions which were obnoxious to him, with the result that that course of conduct on her part undermined his health.

This court always has to see that cruelty, as alleged, comes within the well-established definition—that is to say, conduct by the accused spouse of such a character as to have caused damage to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger—and the court has to be careful to watch that the range of grounds of divorce is not extended to cover mere incompatibility and such falling away from the ordinary mutual relations of husband and wife as do not come within that definition. Nor must one ignore the fact that in undefended suits the court usually hears only one side. Mr. Stirling has put before me to the utmost of his knowledge, and his client's knowledge, the case which might have been presented by the wife had she thought fit to defend the charges against her: having heard the evidence and the useful and able argument, and considered the authorities cited to me, I have come to the conclusion that the husband has established his case.

[The commissioner stated the facts, saying of the letter of April 25, 1945, that the husband had told him that what he really wanted was a daughter, and that some significance must be attached to the passages from the letters written by the wife before marriage, as quoted above, as showing her state of mind at that time, and that from them he (the commissioner) was entitled to deduce that the wife was not looking forward to marriage with that full-hearted enthusiasm which might be expected from a young woman whose fiancé was soon to return from the war. She had, however, resolved her doubts and married him in November, 1945, according to the solemn vows made in the sacred ceremonial of the Church of England. The commissioner continued:] I have already pointed out that, in a case like this, it is essential in the absence of a defence to become acquainted with all the circumstances available on both sides, and I have therefore admitted as evidence the shorthand transcript of the proceedings before the justices.

The issue before me now is not quite the same as the issues which the justices had to decide, but nevertheless the question here—the refusal of the wife to render ordinary intercourse and to make possible conception—was fully ventilated before the bench. In substance, the husband gave the same evidence on that point as he has given here. Among other things, he said that he gave his wife ample opportunity of joining him in his flat at Atworth. The wife's story, put shortly, was that she never refused free intercourse and that, in fact, it often took place. She maintained that her husband was under-sexed, although she was not, and that he was lacking in affection for her. She said that she was prepared to have a child and had no fear of childbirth.

The justices held that there was a refusal of intercourse by the wife, and an eventual agreement to separate, and they dismissed the summons.

The petition very clearly set out the case which has been elaborated at considerable length in evidence. It was duly served on the wife and she has not thought fit to take any action whatever.

In a case like this I do not think that there is much doubt that she could have obtained security for costs of any defence. She has not thought fit to take any action whatever about it, but, of course, that does not necessarily mean that she has not got a case. Her case was, however, fully presented before the justices, who had the advantage of seeing both parties; and it is quite obvious from their decision that they accepted the husband's story and not the wife's. I have seen the husband only, but I am quite satisfied that I can believe every word he says. I am satisfied that he has not exaggerated his case and that he has told the truth, not only about his wife's attitude but also about the reaction upon his own well-being. The husband told me that he had got into a very bad state of health, but that the tension under which he had been living gradually diminished after the final parting with his wife in the autumn of 1953. I have had corroboration of this from his sister and his landlord, who described the husband's tense and emotional state when he first went to Atworth. Mr. Arnold Crowther, the husband's solicitor, described the husband's distraught condition during the proceedings before the justices, and how he broke down and wept twice, and even then was still suffering from a tremendous strain.

Apparently the husband did not go to a doctor because, when on two occasions his wife suggested that he should see a psychologist owing to his restless condition, he retorted that it was no use as the cause of his condition was manifest to her, as it was to himself.

I am satisfied that the injury to his mental health was caused in the main by his wife's persistent refusal to be a wife to him in the full sense, (a) by her insistence on contraceptives, and (b) by refusing him the chance of a child.

Quite apart from the exhortation in the solemnization of matrimony that, first, Christian marriage was ordained for the procreation of children, I cannot ignore the fact that it is a natural instinct in most married men to propagate the species and to bear the responsibilities, and enjoy the comforts, of their own children. If a wife deliberately and consistently refuses to satisfy this natural and legitimate craving, and the deprivation reduces the husband to despair, and affects his mental health, I entertain no doubt that she is guilty of cruelty within the definition on which this court always acts.

Mr. Stirling has offered me a very useful review of the authorities dealing with this matter. The question of the refusal of free intercourse is considered in *Baxter* v. *Baxter*[1] on an issue of wilful refusal in nullity. There a wife insisted on the use of a contraceptive and the husband reluctantly acquiesced. When he petitioned for nullity on the ground of wilful refusal, it was held that the marriage had been consummated by the process of intercourse employed; but Lord Jowitt L.C. in his speech said[2] "the proper occasion for considering the subject raised "by this appeal is when the sexual life of the spouses, and the "responsibility of either or both for a childless home, form the "background to some other claim for relief."

In *Walsham* v. *Walsham*[3] it was held that a husband's abstention from marital intercourse for varying intervals modified by occasional acts of coitus interruptus contrary to the wife's wish adversely affected the wife's health and constituted cruelty.

---

[1] [1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886.

[2] [1948] A.C. 274, 290.

[3] [1949] P. 350.

1955

FORBES
v.
FORBES.

Mr. Commissioner Latey Q.C.

There were similar decisions in *White* (*orse. Berry*) v. *White*[4] and *Cackett* (*orse. Trice*) v. *Cackett*.[5] Here, it is a wife's abstention that is in question, and Mr. Stirling has drawn my attention to an authority in the Court of Appeal, which on the face of it might seem to run counter to the general proposition which I have just stated. That was *Fowler* v. *Fowler*.[6]

The principle stated in the headnote to *Fowler* v. *Fowler*[6] is this: "Where a wife refuses to have children and refuses to "have sexual intercourse, except on the understanding that the "husband prevents conception, with a consequential injury to "the husband's health, the wife is not guilty of cruelty unless "her conduct is intended to inflict misery on her husband." Mr. Stirling has dealt with this case in detail. Personally, I do not think that that paragraph quite conveys the full effect of the judgments, with their qualifications. In that case, as in this, the wife refused intercourse except with a contraceptive, and equally it was shown in that case that the husband desired a child. In that case the wife put forward as an excuse for not having a child in the early years the unsettled conditions caused by the war; later, having had a womb operation, she urged that it was unsafe for her to conceive a child, and, still later, changed her mind and claimed that they could not afford a child. The commissioner who tried the case held that the husband's anxiety-state could not be attributed to the wife's attitude, and the petition failed.

The Court of Appeal held that there was no cruelty unless the wife by her conduct intended to inflict misery on her husband. Denning L.J. held that such an intention could easily be inferred if a husband took contraceptive measures against the wife's will, but that was not necessarily so vice versa, because a wife's conduct might be attributed to fear of consequences to herself, without any intention to injure her husband.

How far intention should be considered an ingredient of cruelty has been discussed recently in a number of cases before the higher tribunals, and I do not propose to traverse this somewhat thorny path. I will content myself with the statement of principles laid down in the House of Lords in *Jamieson* v. *Jamieson*,[7] and so lucidly summarized in the more recent case of *Cooper* v. *Cooper*.[8]

---

[4] [1948] P. 330.

[5] [1950] P. 253; 66 T.L.R. (Pt. 1) 723; [1950] 1 All E.R. 677.

[6] [1952] 2 T.L.R. 143.

[7] [1952] A.C. 525.

[8] [1954] 3 W.L.R. 867; [1954] 3 All E.R. 415.

The particular passages in *Jamieson* v. *Jamieson*[9] which are very relevant to the present case are from the judgment of Lord Merriman P., in which he said[9]: "In saying this, however, "I must not be taken to suggest that either in England or in "Scotland it is essential to impute to the wrongdoer a wilful "intention to injure the aggrieved spouse in order to establish a "charge of cruelty. In *Mackenzie* v. *Mackenzie*[10] Lord Watson "said: 'I do not impute to the appellant that his conduct, cruel "'and reprehensible as it was in my estimation, was dictated "'by a wilful intention to injure the respondent.' Likewise in "*Kelly* v. *Kelly*,[11] to which I shall recur later, because it is "the leading case in England on the subject of cruelty without "physical violence, Lord Penzance, in his judgment in the full "court, said: 'He says that he does not desire to injure her, "'and it has never been asserted that he does.'" And then Lord Merriman P. went on to refer to a citation by Tucker L.J. in *Squire* v. *Squire*,[12] a citation from a judgment of Shearman J. in *Hadden* v. *Hadden*,[13] in which Shearman J. said: "I do not "question . . . that he had no intention of being cruel . . . but ". . . his intentional acts amounted to cruelty."

That, to my mind, is the shortest way in which any judge has put the principle—and the clearest—that is to be acted upon.

There were other passages, by Lord Normand[14] and Lord Reid,[15] the former going particularly to support the passage I have read by Lord Merriman P.; Lord Reid perhaps in not quite such a strong way; and there is a passage by Lord Tucker which seems to me to be very much to the point. Lord Tucker said[16]: "Every such act must be judged in relation to its attendant "circumstances, and the physical or mental condition or suscepti- "bilities of the innocent spouse, the intention of the offending "spouse, and the offender's knowledge of the actual or probable "effect of his conduct on the other's health (to borrow from the "language of Lord Keith) are all matters which may be decisive "in determining on which side of the line a particular act or "course of conduct lies."

As I have stated, there have been a number of cases in which guidance has been given on the question of intention, but in this particular case I find that the wife respondent knew very well what she was doing to her husband in the course of her persisting in evasion and refusal.

---

[9] [1952] A.C. 525, 540.

[10] [1895] A.C. 384, 409.

[11] (1870) L.R. 2 P. & M. 59, 72.

[12] [1949] P. 51, 58; 64 T.L.R. 371; [1948] 2 All E.R. 51.

[13] The Times, Dec. 5, 1919, p. 5, col. 3.

[14] [1952] A.C. 525, 534–5.

[15] Ibid. 548–9.

[16] Ibid. 550.

In *Fowler* v. *Fowler*[17] both Hodson and Denning L.JJ. emphasize the wife's fear of childbirth, and it was also emphasized that the wife was never warned by the husband of the effect of her refusal on his health. The essential distinction in the present case is that the husband was constantly complaining to the wife of her course of conduct, and was using all reasonable means to persuade her to change her attitude, and that she was well aware that she was causing him extreme anxiety and misery by her persistence in refusing any opportunity of conception.

Knowing her husband's feelings, knowing that the practice she insisted upon was repulsive to him, and that his desire for fatherhood had become an obsession, a legitimate obsession, an ever-growing load on his mind, taunting him as she did, she cannot in my view be acquitted of the intention to pursue her policy of abstention, whatever the result to him. Moreover, as I have already said, she definitely stated on oath before the Bath justices that she had no fear of childbirth.

In those circumstances, I find that the wife has been guilty of cruelty to the husband, and in the exercise of my discretion I pronounce a decree nisi in his favour.

Decree nisi.

Solicitors: *Sharpe, Pritchard & Co. for A. G. Smith & Co., Melksham, Wilts.*

E. J.

---

[17] [1952] 2 T.L.R. 143.

1955
April 4, 5, 29.

Sachs J.

MOSEY *v.* MOSEY AND BARKER.

Husband and Wife—Maintenance—High Court—Divorce—Death of husband—Order for secured provision for wife and child—Death of husband before real property agreed—Order enforceable against executor—Executor not entitled to vary—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1). *Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *ss.* 19, 26, 28.
Death.

On the dissolution of a marriage an order was made securing an annual sum for the maintenance of the wife for her life "upon "part of the real property [of the husband] to be agreed or to be "referred to the district registrar in default of agreement" and

1955

Mosey
v.
Mosey and
Barker.

further securing, in the same terms, a gross sum to be secured to her for the benefit of the child of the marriage.

The husband died before the security had been specified and the wife applied to enforce the order against the sole executor of the husband. The executor sought by a cross-application to vary the order by deleting so much of it as related to the gross sum to be secured for the child of the marriage:—

Held, that as that part of the order securing the annual sum laid down what was to be done and how it was to be done the maxim certum est quod certum reddi potest applied, thus creating an enforceable claim against the estate to which section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, was applicable.

Richards v. *Richards and Flockton* [1942] P. 68n. and *Waterhouse* v. *Waterhouse* [1893] P. 284 applied; *Hyde* v. *Hyde* [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362 and *Barker* v. *Barker* [1952] P. 184; [1952] 1 T.L.R. 1479; [1952] 1 All E.R. 1128 distinguished.

With regard to the cross-application, the right of a wife to apply for the exercise of the court's discretionary powers to grant or increase secured maintenance and the right of a husband's executor similarly to apply to extinguish or diminish that maintenance must stand on an equal footing as constituting claims which can or cannot be enforced against or by a personal representative of a deceased spouse by virtue of section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934. The court, however, had no jurisdiction to entertain the cross-application.

Dipple v. *Dipple* [1942] P. 65; 58 T.L.R. 141; [1942] 1 All E.R. 234 applied.

Per curiam. (i) The effect of the words of the order "part of "the real property," taken in conjunction with the fact that the registrar on making the order had before him a list of the husband's real property, would appear to create a pool of property from which the wife had a right to have a selection made, and thus to operate in equity to give a general charge upon the whole of the real property until the selection had been made.

Montagu v. *Earl of Sandwich* (1886) 32 Ch.D. 525; 2 T.L.R. 392 considered.

(ii) Even if the court had jurisdiction, once an order for secured provision had been complied with, to entertain applications by those who had in their personal capacities a present or future interest in the security to have such an order varied, it was to be assumed that such a jurisdiction would only be exercised with considerable caution and in exceptional circumstances.

Summons (adjourned into court).

On December 7, 1951, the wife obtained a decree nisi against the husband on the cross-prayer of her answer on the grounds of his adultery and cruelty. On January 25, 1952, the decree was made absolute. On December 23, 1952, Mr. Registrar Grindal Gray, at Scarborough, on the wife's application, made an order

1955

MOSEY
v.
MOSEY AND
BARKER.

under sections 19 and 26 of the Matrimonial Causes Act, 1950, that " Cecil William Mosey do secure to Irene May Mosey for her " life, until further order, as from the date of the decree absolute " herein, to wit, the 25th day of January, 1952, the annual sum " of £300 upon part of the real property of the said Cecil William " Mosey to be agreed or to be referred to the district registrar in " default of agreement and that in default of agreement between " the parties as to the form of deed it be referred to conveyancing " counsel of the High Court to settle the necessary deed or " deeds.

" And it is further ordered that the said [husband] do secure " to the said [wife] the gross sum of £750 for the benefit of " Michael Sydenham Mosey the child of the marriage on part " of the real property of the said [husband] to be agreed or " referred to the district registrar in default of agreement and " that in default of agreement between the parties as to the form " of deed it be referred to conveyancing counsel of the High " Court to settle the necessary deed or deeds.

" And it is further ordered that the said [husband] do pay " or cause to be paid to the said [wife] until the said Michael " Sydenham Mosey shall attain the age of twenty-one years or " until further order as from the date of decree absolute maintenance at and after the rate of £80 per annum less tax such " sum to be payable monthly . . ."

Between January 14, 1953, and March 25, 1953, correspondence passed between the solicitors of the respective parties with a view to agreeing which properties of the husband should be selected to constitute the security, but they failed to reach agreement. On March 31, 1953, the husband died. The net value of his estate as sworn for probate was £44,418, including real estate sworn at £25,581.

On June 9, 1954, the wife issued a summons against the sole executor of the husband calling upon him to show cause why he should not be ordered to execute a deed pursuant to the order for security of December 23, 1952. The executor issued a cross-summons against the wife calling upon her to show cause why the order of December 23, 1952, should not be modified by omitting the provisions for securing to the wife the sum of £750 for the child of the marriage and ordering her to be paid maintenance for the child at the rate of £80 yearly until it should reach the age of 21 years.

Ifor Lloyd Q.C. and *Geoffrey Crispin* for the wife. The order of December 23, 1952, gave to the wife at the moment at which it was made the right which she now seeks to enforce; it was a complete order, referring to definite assets and not creating a general charge; and it required no amendment or any other act except a purely administrative one, namely, the decision either by agreement between the parties or by order of the registrar as to which of the properties were to form the subject-matter of the security. That is as much an administrative matter as the execution of the deed in *Hyde* v. *Hyde*,[1] where an order was made that the husband's executors should execute the necessary deed to give effect to the order for secured provision coupled with the agreement subsequently reached between the husband, before his death, and the wife as to the specific assets which were to form the subject-matter of the security.

The court had power to make orders for the payment of costs before the Law Reform (Miscellaneous Provisions) Act, 1934, in cases where a fund had been paid into court under an order, even though the suit had abated owing to the husband's death before hearing: *Hall* v. *Hall*[2]; *Beaumont* v. *Beaumont*.[3] But the court would not make such an order where no funds were already in court: *Coleman* v. *Coleman and Simpson*[4] (where the husband died before the security ordered had been paid in); *Brydges* v. *Brydges and Wood*[5] (where the co-respondent died before he had complied with an order to pay damages and costs); *Maconochie* v. *Maconochie*[6] (where there had been no order for security of costs).

The court has power after the death of a party to vary a marriage settlement: *Ling* v. *Ling and Croker*,[7] although it will refuse to make a decree nisi absolute for the purpose of allowing such a variation after a party's death: *Grant* v. *Grant*, *Bowles and Patteson*.[8] The application in *Ling* v. *Ling and Croker*[9] was explained and distinguished in *Stanhope* v. *Stanhope*[10] (where the deceased husband's executor unsuccessfully applied for the decree nisi to be made absolute) as one which was "not really a "step in the suit but an application under a statutory power given "when the decree had become absolute." It is submitted that the present application is not a step in the suit but one made

---

[1] [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362.

[2] (1864) 3 Sw. & Tr. 390.

[3] [1933] P. 39; 49 T.L.R. 35.

[4] [1920] P. 71; 36 T.L.R. 255.

[5] [1909] P. 187; 25 T.L.R. 505.

[6] [1916] P. 326; 33 T.L.R. 50.

[7] (1865) 4 Sw. & Tr. 99.

[8] (1862) 2 Sw. & Tr. 522.

[9] 4 Sw. & Tr. 99.

[10] (1886) 11 P.D. 103, 108.

1955

Mosey
v.
Mosey and
Barker.

under a statutory power "on"—which means after—decree absolute.

In *Dipple* v. *Dipple* [11] it was held that the right of a wife to apply for secured maintenance after decree absolute was not a cause of action within the Law Reform (Miscellaneous Provisions) Act, 1934, and did not therefore survive against the husband's estate, but it is to be noted that the judgment states that the cause itself would have survived had the respondent died during its pendency. Reference is made in *Dipple* v. *Dipple* [12] to *Richards* v. *Richards and Flockton*,[13] in which it was held that an order for costs made against a co-respondent in his lifetime survived by virtue of the Act of 1934. The present case bears a close analogy to that case. In *Richards* v. *Richards and Flockton* [14] there had been an order for such costs as, on inquiry—the inquiry in fact taking place subsequent to the co-respondent's death—a registrar shall decide. Similarly in the present case the order was made in the lifetime of the husband, although the details remained undetermined when he died. This distinguishes the present case from *Dipple* v. *Dipple*,[15] in which no right had survived save to ask the court to exercise its discretionary powers.

The order which was before the court in *Hyde* v. *Hyde* [16] was similar to that in the present case, but there the maintenance was to be secured upon security to be agreed; there was no provision to meet the event of a disagreement as to the nature of the security, nor was any right given to refer the matter back except for the purpose of settling the deed. In the present case there is, however, a specific order as to the nature of the property and as to referring the matter back to the registrar.

[Sachs J. If one applies the maxim "id certum est quod "certum reddi potest," referred to in Broom's Legal Maxims,[17] in conjunction with the phrase "to be decided by the registrar," would not the result be in your favour?]

The mere selection of the properties by the registrar makes this order certain.

An order for secured maintenance was final at the date of *Dipple* v. *Dipple*,[18] but is, since 1950, subject to variation. Had the husband in the present case survived, the order might have been varied up or down.

---

[11] [1942] P. 65; 58 T.L.R. 141; [1942] 1 All E.R. 141.

[12] Ibid.

[13] [1942] P. 68n.

[14] Ibid.

[15] [1942] P. 65.

[16] [1948] P. 198.

[17] 10th ed., p. 422.

[18] [1942] P. 65.

The decision in *Hyde* v. *Hyde*[19] is authority for the enforcement of the present order; it goes a step further only in so far as in that case there had been agreement between the solicitors as to the shares which were to form the security. The order in the present case, referring as it does to "part of the real property," is sufficient and is complete as it stands.

With regard to the executor's summons, this is the first time that the executor of a dead husband has applied to the court to vary an order for secured provision. He is here to answer the wife's summons, but so far as his own summons is concerned it is submitted that he has no locus standi and must have leave to intervene.

[SACHS J. I propose to grant leave nunc pro tunc.]

I make no objection to that.

[*Viscount Hailsham Q.C.* (for the executor). I formally apply for leave to intervene but do not concede that the objection is good.]

[*Lord Hailsham Q.C.* It is contended that the failure to complete is fatal to both orders and the submission will be that both died with the husband and all that remains is the application to vary the £80 per annum maintenance ordered to be paid to the child.]

[SACHS J. I give leave to intervene on a nunc pro tunc basis by consent. Is there any distinction between the enforcement of the child's and the wife's order?]

No, the child is no better off than the wife. Counsel for the executor is blowing hot and cold. He says that there is no order because it ceased on the death of the husband, yet he is applying to vary the order so far as the child is concerned.

An executor has no power to apply to vary an order for maintenance made under section 28 of the Matrimonial Causes Act, 1950—such an application has not previously been made.

[SACHS J. What section is the lineal descendant of section 5 referred to in *Ling* v. *Ling and Croker*?[20]]

That is section 25 of the Matrimonial Causes Act of 1950, setting out the power of the court to make orders as to the application of settled property.

Application could still be made to vary the registrar's order by inserting specific securities into it.

[SACHS J. If the claim is not enforceable, it cannot be varied.]

It is a valid order which it is impossible to operate.

---

[19] [1948] P. 198.

[20] 4 Sw. & Tr. 99.

[Sachs J. Is that not a fallacy? The argument now is whether the order can be carried on after death. If that is not so, nothing in section 28 of the Act of 1950 can make it carry on.]

Viscount Hailsham Q.C. and *Norman Stogdon* for the executor. If an order for security constitutes a charge upon a specified part of an estate, the court has jurisdiction; if not, it has no jurisdiction to do what it is now being asked to do or, indeed, anything. Whether or not there is a charge depends upon whether the original order specified the property. If it did, it is enforceable: *Maclurcan* v. *Maclurcan.*[21] Alternatively, if the parties have come to an agreement, then a charge is created: *Hyde* v. *Hyde.*[22] The effect of the judgment of Barnard J. in that case is that an order together with an agreement creates a charge. If in default of agreement in the present case the registrar had specified the property, there would have been a charge. As no property has been specified there is no charge.

What remains to be done is not an administrative act; it is an agreement by the parties or a specification by the registrar—a judicial act.

[Sachs J. Had there been sufficient disagreement for the registrar to act?]

No. The execution of a deed is an administrative act; the selection of properties is judicial. It is wrong to say that there was very little left to negotiate between the parties as to the security. Very little is not the same as nothing. It is also wrong to say that an administrative act only was required or that the order sufficiently specified the properties.

[Sachs J. If a merchant bank lent money to the owner of 20 or 30 shops on security of shops from among them to be agreed or in default to be specified by the President of the Law Society, could not the agreement be enforced if the man died?]

It is submitted not; the only remedy would be damages. The maxim " id certum est . . ." is applicable to matters such as the sale of goods but not in considering a charge on property: see *Dipple* v. *Dipple* [23]; the only question then is whether there is a charge or not. The principle stated in *Beaumont* v. *Beaumont,*[24] that " where there is a res in court there is jurisdiction to deal " with it notwithstanding the death of a party to the suit," [25] is adopted, and it is submitted that there is otherwise no jurisdiction. In *Barker* v. *Barker* [26] the Court of Appeal held that the court had no jurisdiction to create a floating charge on the husband's assets by way of security.

---

[21] (1897) 77 L.T. 474.

[22] [1948] P. 198.

[23] [1942] P. 65.

[24] [1933] P. 39.

[25] Ibid. 50–1.

The court would not allow that to be done by implication which it could not do expressly. In *Maclurcan* v. *Maclurcan* [27] the wife had an equitable charge on the property specified in the order, and it was on that basis that Barnard J. reached his decision in *Hyde* v. *Hyde* [28] and was able to distinguish *Dipple* v. *Dipple*.[29] He specifically rejected the argument that the order created a floating charge over the whole estate.[30] No such charge was created in the present case, and this was not altered by the fact that there was provision for the selection of property in default of agreement. When the question is asked: "What "property is charged?" the answer is: "Unless there is agree-"ment or a registrar's order, none," and so there is no res according to the decision in *Beaumont* v. *Beaumont*.[31]

[Sachs J. Does that principle still apply after the Law Reform (Miscellaneous Provisions) Act, 1934?]

That depends upon whether an order for security is a cause of action that survives under the Act of 1934. It would appear that an order for costs is—although the only authority for this is *Richards* v. *Richards and Flockton* [32]—but, it is submitted, an order for security is not. If such an order can be a cause of action how can it survive without a res?

To sum up, for an order for security to survive it must amount to: (i) a cause of action within the Law Reform (Miscellaneous Provisions) Act, 1934; that is not the case here; or (ii) a charge creating a res or property in the wife which can survive against the estate. This was recognized in the admittedly analogous case of *Barker* v. *Barker*,[33] which is used for two purposes: first, it would not be correct to regard the present order as creating a floating charge over the husband's whole property or part of it, the words "upon part of the real property" not being apt to create a charge of any kind. Secondly, as to the nature of the husband's obligation, it was a personal obligation and not in the nature of a debt or a covenant to pay. Jenkins L.J. in *Barker* v. *Barker* [34] said that the court could not delegate its discretion as to the specification of the property to conveyancing counsel.

---

[26] [1952] P. 184; [1952] 1 T.L.R. 1479; [1952] 1 All E.R. 1128.

[27] 77 L.T. 474.

[28] [1948] P. 198.

[29] [1942] P. 65.

[30] [1948] P. 198, 203.

[31] [1933] P. 39.

[32] [1942] P. 68n.

[33] [1952] P. 184.

[34] Ibid. 191.

Whatever the order in the present case does, it does not, by implication, impose a floating charge on a portion of the husband's assets. The effect of the order is not to create an estate in the wife; it is to do part of that required by section 19 of the Matrimonial Causes Act, 1950, and leaves undone the remainder of the court's judicial function, namely, to select the assets. When the property remains to be ascertained by a judicial decision the court has not yet fulfilled its duty under section 19 and an uncertain order is invalid.

[SACHS J. Are there not two points to be considered: (i) whether the order constitutes an enforceable claim, and (ii) whether it constitutes an equitable charge on all the property? These are separate though interrelated points, and the second may be the more difficult to establish.]

This order would not create a charge upon anything—it excludes the whole and does not specify the part. In *Hyde* v. *Hyde* [35] Barnard J. said that an order in similar terms could not possibly create a floating charge. *Barker* v. *Barker* [36] is referred to again to show how the first point is dealt with there. The remedy is a personal one against the husband and not even a covenant to pay. See also the judgment of Lindley L.J. in *Medley* v. *Medley* [37]: "it is clear that [the word 'secure'] does "not include payment." Reliance is placed on that as showing that an obligation of this kind is a personal one imposed by statute to *secure* and not to *pay*.

[SACHS J. Hodson J. in *Dipple* v. *Dipple* [38] has said that the right to a decree nisi would be transmittable under the Act of 1934 were it not that death brings about the very thing claimed.]

It is said in Rayden on Divorce [39] that "It is not easy to "determine what effect will be given to this statute [the Act "of 1934] in matrimonial proceedings." It is submitted that matrimonial proceedings are not a cause of action within the statute, for the right is destroyed on death. This may not be true with regard to some ancillary relief, but it is so with regard to the relief given under section 19 (2) of the Act of 1950: *Dipple* v. *Dipple*.[40] Considering other purely pecuniary obligations outside the divorce court, the nearest analogy is bastardy orders, which do not survive the death of the putative father: *In re Harrington*.[41] If a statutory obligation is imposed and a statutory method of enforcement provided for, that is the only way in which the claim can be enforced.[42] Another matter which might be considered as analogous is alimony pending suit; this also does not survive death: *In re Hedderwick.*[43] In *In re Bidie, decd.*,[44] it was held that a wife cannot recover under an order under the Married Women (Summary Jurisdiction) Act, 1895, after the husband's death. *In re Hedderwick*[45] was followed and *In re Stillwell*[46] was rejected.[47] It is submitted that the claim only ripens into an enforceable one against a dead husband's estate in the circumstances of *Maclurcan* v. *Maclurcan*[48] and *Hyde* v. *Hyde*,[49] that is to say, where the court is functus officio.

---

[35] [1948] P. 198, 203.

[36] [1952] P. 184.

[37] (1882) 7 P.D. 122, 125.

[38] [1942] P. 65, 68.

[39] 6th ed., p. 437, n. (*k*).

[40] [1942] P. 65.

[41] [1908] 2 Ch. 687.

In conclusion on this point, it is submitted that under section 19 (2) of the Act of 1950 the court can, prima facie, order that the husband shall secure to the wife a certain maintenance. Until an order is made specifying the assets, all the wife has is a claim unless she acquires an equitable right, when she is able to force the husband to complete. If the husband in the present case were alive, counsel for the wife would be asking the court to specify the properties; this must be contrasted with the form of the present summons: ". . . that the executor do execute a "deed . . ." It is not the implementation of the old order which is being asked for but the making of a new order with a different party. The summons is asking for that to be done which, in *Dipple* v. *Dipple*,[50] it was said that the court could not do. This is relied on not as a technical point but as a matter of substance. The new summons, in fact, does not seek to apply the old order at all, but takes an offer from a letter of the husband's solicitor, written when the husband was still alive, and asks the court to say that an order should be made against the executor to enforce it.

If the order is alive, it is conceded that there is something that the court can do, but if it is extinct, there is nothing to vary, and that is what counsel for the wife is seeking to do—to invoke section 28 of the Act of 1950 to vary this defunct order.

The position of an executor is defined mainly by statute, and the duties are to get in the estate, to pay debts, but only the debts for which he is trustee, and to carry on the business or manage the property.

---

[42] [1908] 2 Ch. 687, 689.

[43] [1933] Ch. 669.

[44] [1948] Ch. 697; aff. [1949] 1 Ch. 122; 65 T.L.R. 25; [1948] 2 All E.R. 995.

[45] [1933] Ch. 669.

[46] [1916] 1 Ch. 365.

[47] [1948] Ch. 697, 706–7.

[48] 77 L.T. 474.

[49] [1948] P. 198.

[50] [1942] P. 65.

1955

Mosey
v.
Mosey and
Barker.

[Sachs J. Suppose the husband is ordered to give security and before he has done so he disposes of his real estate: what remedy has the wife?]

If a statute gives a right and a remedy the court will have recourse to another remedy only if it is clear that the statute so intends: *Solomons* v. *R. Gertzenstein Ld.*[51] There is no duty in an executor to do more than pay a debt unless there is an enforceable equitable right against the owner of the legal title. If the order had reached a stage at which it was legally enforceable, *Hyde* v. *Hyde*[52] would apply. The rock upon which the present case breaks is that it was not merely an administrative act which was left to be done, but a failure to agree the property.

As to the executor's summons, he has to establish his right to apply for a variation, and this appears to be the first time such a matter has been before the court. Rayden states[53]: "There "is no provision that an application under section 28 [of the "Act of 1950] can be made only by a husband or a wife. The "petitioner's executor has no interest but since 1934 this may "be different." The terms of section 28, by essential implication, give the executor a right to intervene in his own interest. To the extent to which any order for maintenance binds the estate of a deceased husband, the executor is a person who is entitled to intervene for the purpose of obtaining a variation, but this right also extends to any person interested. So long as the estate is not wound up, prima facie the only person entitled to apply is the personal representative, but I am not saying that in default of an executor or when the estate is wound up a beneficiary may not intervene.

The court has to consider whether there is a change in circumstances and what is the right thing to do. The child is amply provided for and the basis and substratum of the order are gone. Death is always a change of circumstances which may alter the financial situation of a wife who has obtained an order for herself or children, and if it brings about an enrichment, the right to variation cannot be challenged. Once it is assumed that the statute intended others than the parties to apply to vary, the rest follows clearly.

To sum up, it is submitted that on the facts this order was never completed in so far as it did not specify the property and that such specification required a further judicial act. On the law, what the wife had at the moment of death was a right to

---

[51] [1954] 2 Q.B. 243; [1954] 1 All E.R. 1008.

[52] [1948] P. 198.

[53] 6th ed., p. 60.

1955

MOSEY
v.
MOSEY AND
BARKER.

perfect the order by an application to the registrar to nominate properties. She at no time had an enforceable right or a right of action or a charge against the husband's estate or any equitable or legal right of property.

Lloyd Q.C. in reply. Matrimonial causes are not excluded by section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, and, therefore, it is submitted, are within the statute. The types of matrimonial causes which might survive are referred to in *Stanhope* v. *Stanhope*.[54] The suit itself must obviously come to an end on the death of one of the parties, but rights which arise after decree absolute survive. Such a right is the subject of the present case.

An executor has no right to apply to vary secured provision, and it is further submitted that the law will not permit him to intervene in such a matter, for the whole object of secured provision, in contrast to bastardy and alimony orders, is to enable the wife to be provided for after the husband's death. Bastardy and alimony orders presuppose a living man. The court intervenes after death (i) with regard to applications in respect of infants, notably custody, and (ii) in cases such as *Ling* v. *Ling and Croker*,[55] where a guardian may come in and apply to vary a settlement on behalf of children. There is no case in which a variation has been made in favour of a wife after the husband's death. It is also submitted that neither a wife nor an executor can vary an order for secured maintenance after death.

The cases which have been cited are relevant to two questions: (i) Does the order constitute an enforceable claim? (ii) Does it constitute an equitable charge? In *Barker* v. *Barker*[56] Jenkins L.J. disapproved of in terrorem orders and said that the floating charge which had been created in that case might be invalid as infringing the Bills of Sale Act: that was the substance of the decision in that case. Both *In re Harrington*[57] and *In re Hedderwick*[58] were cases in which the intention was to provide for circumstances arising during the lifetime of the party liable to maintain. Bastardy and alimony orders have already been dealt with, but it is clear that alimony is by nature pending suit and must cease on death.

[SACHS J. Lord Hailsham's point was that they cannot be enforced by other than the statutory means: *In re Bidie, decd.*[59]]

---

[54] 11 P.D. 103.

[55] 4 Sw. & Tr. 99.

[56] [1952] P. 184.

[57] [1908] 2 Ch. 687.

[58] [1933] Ch. 669.

[59] [1948] Ch. 697; aff. [1949] 1 Ch. 122.

1955

MOSEY v. MOSEY AND BARKER.

Maintenance can be enforced by sequestration. In the present case there is an enforceable order creating a charge precise enough to be specifically enforced, and an enforceable order conferring a cause of action upon the wife which is complete in itself and only needs working out. As to the first point, reliance is placed on the maxim cited in Broom's Legal Maxims, Id certum est quod certum reddi potest.[60] This is a maxim applying to the construction of documents; for example, a lease for so many years as X shall name is a good lease, and an agreement that A shall convey to B five of his 15 houses in default of agreement the houses to be selected by X would be enforced.

[SACHS J. If, for instance, money is lent in consideration of a covenant to repay and five houses as security are to be selected by a judge, have you a charge?]

There is a right to register a charge on all 15 houses to ensure that the houses are available for the selection of the judge. There is an enforceable right.

[SACHS J. So a stranger would take subject to your right? Have you any authority for that?]

Yes, *Owen* v. *Thomas* [61] and *Pritchard* v. *Ovey*.[62] Those cases concern an annuity for lives to be selected by the plaintiff, which the court will enforce because a selection is not making a new agreement. See also Fry on Specific Performance.[63]

As to the second point, the wife has an enforceable order. It has been said that the wife in the present case is no better off than was the wife in *Dipple* v. *Dipple*.[64] That is not so—in the present case the wife has a complete order. *Hyde* v. *Hyde* [65] was a case decided on the special terms of the order made in that case and it was not said that a specific security was necessary. The security in the present case has been sufficiently particularized and the order is not framed in terms so wide as to constitute a floating charge on all the property.

[SACHS J. Had the order referred to all the property you would clearly be entitled to succeed.]

Can it then be said that the need for specification by the registrar is to deprive the wife of her protection? What the registrar specified was so much of the property as was necessary to secure the sum. [*Waterhouse* v. *Waterhouse* [66] was referred to.] The words "as is necessary to secure" should be read into

[60] 10th ed., p. 422.

[61] (1834) 3 M. & K. 353.

[62] (1820) 1 J. & W. 396.

[63] 6th ed., p. 155.

[64] [1942] P. 65.

[65] [1948] P. 198.

[66] [1893] P. 284.

the registrar's order, and the wife asks, not for a new order, but for one pursuant to the registrar's order.

Cur. adv. vult.

Sachs J., reading his judgment, referred to the nature of the order and to the facts, and continued: The question raised by the application is whether the order can be enforced against the sole executor of the husband or whether the death of the husband results in the wife having as from that date no rights under the order.

There are two decisions since the enactment of the Law Reform (Miscellaneous Provisions) Act, 1934,[1] which touch closely on the above question. The first is *Dipple* v. *Dipple*,[2] where Hodson J. held that the right of a wife to apply for an order under section 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, was not a "cause of action" within section 1 (1) of the Act of 1934; accordingly where before the death of the husband the wife had made an application under section 190 (1), but had not reached the stage of obtaining an order, her claim could not survive his death.

In that case Hodson J. distinguished "the right to ask the "court to exercise discretionary powers" from "having an "enforceable claim." He instanced an order for costs made against a party in his lifetime as constituting an enforceable claim kept alive by the Act of 1934 even where taxation had not yet taken place, and in this behalf referred to his decision in *Richards* v. *Richards and Flockton*.[3] Formerly the order for costs would have ceased to have effect on the death of a party to the proceedings: *Coleman* v. *Coleman and Simpson*.[4]

The second decision was that of Barnard J. in *Hyde* v. *Hyde*.[5] There an order had been made for an annual sum to be secured "upon security to be agreed" and before the death of the husband agreement had been reached as to the security to be provided, but no deed had been executed. Mr. Upjohn K.C., having established that by virtue of the order an equitable charge arose as soon as the security was agreed, Barnard J. rested his decision on the fact that the wife had acquired a charge on agreed specific property and directed the executors to execute the necessary deeds. He thus had no need to consider and did not refer to that branch of Mr. Upjohn's argument that was founded on *Richards* v. *Richards and Flockton.*[6]

---

[1] Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1): "Subject "to the provisions of this section, on "the death of any person after the "commencement of this Act all "causes of action subsisting against "or vested in him shall survive "against, or, as the case may be, for "the benefit of, his estate. . . ."

[2] [1942] P. 65; 58 T.L.R. 141; [1942] 1 All E.R. 234.

[3] [1942] P. 68n.

[4] [1920] P. 71; 36 T.L.R. 255.

[5] [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362.

Lord Hailsham's main and much pressed argument was that the court has here no jurisdiction to deal with a matter arising in a divorce suit after the death of one of the parties, on the short ground that there is no fund in court or other res upon which to found the post-death jurisdiction. He relied in substance on passages in pre-1934 decisions, such as *Beaumont* v. *Beaumont.*[7] But decisions and dicta before the Act of 1934 must be looked at with care to see whether they would have been the same today: and if *Richards* v. *Richards and Flockton*[8] is rightly decided, as I would respectfully agree it was (cf. *In re Boyd,*[9] *per* Lord Esher M.R.), the test since 1934 is not " is there a " res " but " does the order create an enforceable claim? " Indeed, that case disposes of Lord Hailsham's above argument and thus of his suggestion that the wife's case must stand or fall according to whether or not the order then and there created an equitable charge.

Applying the test " Does the order create an enforceable " claim? " I take the view that if an order within its four corners lays down what is to be done and how it is to be done, it creates an enforceable claim—even if at the date of death everything has not yet been done. Here the order is for £300 per annum to be secured on part of the husband's real property, that part to be selected (if agreement has not been reached between the parties) by the registrar. Certum est quod certum reddi potest—a maxim which (as appears from Broom's Legal Maxims, 10th ed., at p. 422) is not confined to interpretation of contracts and which I regard as properly applicable to the present situation. It is to be noted that Broom, in relation to the application of the maxim, makes reference to orders for " costs to be taxed "—and here again *Richards* v. *Richards and Flockton*[10] has its relevance.

Further, an order, in my view, creates an enforceable claim if the court can and will exercise its powers to ensure the order is enforced in relation to the husband's assets during his lifetime. For that purpose it does not matter whether the power is exercised by means of an appropriate injunction, or by other means. If authority is needed to establish that the order in the present case was, at all material times, enforceable, then *Waterhouse* v. *Waterhouse*[11] can be relied on as showing how a court can aid a wife, even before decree absolute, where the husband is bound to secure to his wife maintenance out of a portion of his property not as yet specified.

---

[6] [1942] P. 68n.

[7] [1933] P. 39; sub nom. *In re Beaumont Petition*, 49 T.L.R. 35.

[8] [1942] P. 68n.

[9] [1895] 1 Q.B. 611, 614.

[10] [1942] P. 68n.

Lord Hailsham submitted that if the husband in the present case had under seal or for good consideration (probably the closest analogy would be a contract under seal for past consideration) contracted to give security in terms identical with that of this order, the wife would during his lifetime have no remedy in relation to his assets. Analogies from contracts may be of use in that judgments and orders (even if the latter are not "final "judgments": see *In re Boyd*[12]) can be sued upon save, for instance, where the second action (e.g., for a debt) is so otiose as to be an abuse of the process of the court. Whilst, of course, appreciating that the obligations created by judgments and orders are in some ways regarded as of a higher order, I consider that upon such a contract as Lord Hailsham mentioned the wife would have been able to come to court at any rate for relief parallel to that given in *Waterhouse* v. *Waterhouse*.[13]

I should also record that, in aid of his submissions, Lord Hailsham cited the authorities (including *In re Hedderwick*,[14] *In re Woolgar*[15] and *In re Bidie*[16]) which decide, amongst other things, that arrears of maintenance ordered by a magistrates' court under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, and arrears of alimony, do not constitute recoverable debts as against the estate of a deceased husband. It is sufficient to say, with regard to those authorities, that none of them deals with an order which combined the factors that it was specifically intended to provide for the wife after the death of the husband, related to an alienable and assignable right (which orders for alimony do not), and was one in respect of which the remedies were of the type shown to be available by *Waterhouse* v. *Waterhouse*.[17] In addition, he relied on that part of the judgment of Jenkins L.J. in *Barker* v. *Barker*[18] in which he referred to the order made in that case as being "oppres- "sive in effect, uncertain in operation, difficult of enforcement,

---

[11] [1893] P. 284.

[12] [1895] 1 Q.B. 611.

[13] [1893] P. 284.

[14] [1933] Ch. 669; 49 T.L.R. 381.

[15] [1942] Ch. 318; 58 T.L.R. 252; [1942] 1 All E.R. 583.

[16] [1948] Ch. 697; affd. [1949] Ch. 121; 65 T.L.R. 25; [1948] 2 All E.R. 995.

[17] [1893] P. 284.

[18] [1952] P. 184, 191; [1952] 1 T.L.R. 1479; [1952] 1 All E.R. 1128.

"and of doubtful validity." But that passage must, of course, be considered in the light of the particular facts to which it was being applied. That case related to a general charge on all the assets of the husband: it was an order which, in so far as it included personal effects and chattels, might well not conform to the tenor of the Bills of Sale Acts and which, by reason of its very generality, could have an oppressive effect. That decision does not seem to me to be applicable to a case where any charge created attaches to real property, where the maxim "certum est quod certum reddi potest" can apply, and where there was nothing which could be, or was indeed submitted to be, oppressive in the order against which the husband had lodged no appeal.

I next turn with some diffidence to the further point urged by Mr. Ifor Lloyd—that one of the ways by which the claim created by the order was enforceable was by way of the charge which it created. If so, the present case is covered directly by *Hyde* v. *Hyde*,[19] an authority which Lord Hailsham stated he in no way challenged.

If one looks at the precise form of order made in *Waterhouse* v. *Waterhouse* [20] (which did not specify the property to be affected) and assumes that it carries into effect that part of Lindley L.J.'s judgment which reads [21] "We are asked to make an order "which will operate as a charge upon the respondent's property "and prevent his making away with it. This we can do, and "we make an order confirming the report, and ordering the "respondent, within one week after the decree is made absolute, "to secure to the petitioner £1,000, and restraining him in the "meantime from dealing with the property" it seems to follow that the order in the present case created a charge.

Here again, however, it appears proper to try to apply the somewhat broader test of what would have been the position if the husband had, for good consideration, contracted to give security in terms identical with those of the order.

[19] [1948] P. 198.

[20] [1893] P. 284, 287: "'The "'court confirmed the registrar's "'report, and ordered that the respondent do within one week after "'making the decree absolute herein "'secure to the petitioner the sum of "'£1,000, and that until then the "'respondent be restrained from "'parting or otherwise dealing with "'so much of his property mentioned "'in the report as will not leave "'sufficient to secure the said sum "'of £1,000. With liberty to the "'respondent to apply upon short "'notice to discharge the said order, "'and that service of the said order "'upon the respondent be dispensed "'with, and that the said order "'be served upon the respondent's "'solicitors.'"

[21] [1893] P. 284, 287.

Fully to maintain the analogy one would have to bear in mind that, as stated at the Bar, the registrar on making his order had before him, as is usual in these matters, a list of the husband's real property. It follows that by the order there was created, so to speak, a pool of properties out of which the registrar was, in default of agreement between the parties, to select those which were to be charged. If the wife was given the right to have the selection thus made from that pool, then the husband was not entitled to dispose of parts of the pool till the selection had been made—and in my view a similar term would have to be implied in a contract where, for instance, the words " specified " in the attached schedule " were added after the words " part " of the real property." The parallel would then be complete. Then on the basis that equity regards as done what ought to be done, I would be inclined to the view that a contract in strictly parallel terms would in equity operate to give a general charge on the whole pool of property until the selection had been made.

The position, of course, turns upon the true construction of the registrar's order in the light of the surrounding circumstances. But having reached the above view on general principles, I feel a little fortified by having come upon the case of *Montagu* v. *Earl of Sandwich*,[22] which Lindley L.J. may have had in mind when deciding *Waterhouse* v. *Waterhouse*.[23] There a settlor covenanted " so as to render the real estate (if any) of which he . . . shall die " seized in fee the fund primarily liable " to charge an annuity or yearly sum of £1,000 " upon a sufficient part of the real estate." Of that covenant Fry L.J. said [24]: " That appears to me to have " this operation, that it charges the entire estate of which the " testator dies seised until the execution of a new instrument " which shall charge an adequate part afresh, and thereby discharge the remainder of that which is primarily charged." Bowen L.J. regarded the covenant as obscure, but with hesitation took the same general view as Fry L.J. that the intention of the settlor was to charge the entire estate in the first place. To my mind there is some parallel between the intention which Bowen and Fry L.JJ. held it right to construe out of the above covenant and the intention which seems to me to be implicit in the registrar's order having regard to the practice of this Division.

If, however, contrary to my above view, no specific pool and charge thereon was created by the registrar's order, then the dissenting view of Cotton L.J. in *Montagu* v. *Earl of Sandwich* [25] would (viewing the matter contractually and omitting the *Waterhouse* case [26] from consideration) presumably apply to the present case, and if so the absence of specification of "the part of the "real property" would be fatal to the creation of a charge. For he says [27]: ". . . where the covenant is to charge, not all or "any definite portion of a man's estate, but only that which is "worth £1,000 a year, or which would be sufficient to secure "£1,000 a year, then from the indefiniteness of the matter "referred to there will be no charge unless an instrument is "afterwards executed to give effect to the covenant; and it "remains simply a covenant to be enforced as against the assets "of the covenantor."

---

[22] (1886) 32 Ch.D. 525; 2 T.L.R. 392.

[23] [1893] P. 284.

[24] 32 Ch.D. 525, 545.

The border line seems to be a thin one, and approaching these problems of equity with marked hesitation, I prefer to rest my decision on the footing that the wife has an enforceable claim under the registrar's order irrespective of whether or not it created a charge.

The order for maintenance at the rate of £300 per annum to be secured for the benefit of the wife being, in my view, enforceable against the executor in relation to the estate of the husband, I make a declaration accordingly. It has been agreed between the parties, owing to the way the executor has been dealing with the estate, that they will now work out a form of order to give full effect to the above declaration—rather than that I should here and now make a further order.

The principles upon which I have made the above declaration apply equally to that part of the registrar's order by which the husband was ordered similarly to secure to the wife "the gross "sum of £750 for the benefit of Michael Sydenham Mosey, "child of the marriage," but as to this £750 I have still to consider the cross-application of the executor to discharge, in effect, that part of the order.

Before, however, leaving the wife's application I should refer to the third portion of it by which it was sought to order the executor to pay all outgoings in respect of a certain dwelling-house which was occupied by the wife. As Mr. Ifor Lloyd very properly conceded, in the course of his argument, that this application was untenable, I need say no more than that I refuse to accede to it.

I now turn to the cross-application made by the executor to vary the registrar's order by deleting so much of it as relates to the £750 to be secured to the wife for the benefit of the son of the marriage—an application which, of course, only arose upon the failure of the executor's resistance to the wife's main application.

---

[25] 32 Ch.D. 525, 538–41.

[26] [1893] P. 284.

[27] 32 Ch.D. 525, 539.

The cross-application is not made by the executor otherwise than in his capacity as such: in particular it is not made for the benefit of the son of the marriage. Indeed, it is made against the latter's interests. The sole result of it being allowed would be that the £750 would become part of the residue of the estate and would then be divided equally between the son of the marriage and the executor (a son of a former marriage of the husband) in their capacities as residuary legatees.

It being simply an application to extinguish a right given by the court to the wife for the benefit of the son under the order of December 23, 1952, the cross-application was met in limine by a preliminary objection of Mr. Ifor Lloyd. He objected that section 28 of the Matrimonial Causes Act, 1950, by virtue of which Lord Hailsham said he made the cross-application, did not enable an executor thus to apply for a variation of the order.

The proceedings before me are between the executor as such and the wife ("widow" would be more strictly accurate) in her personal capacity; and the registrar's order is one to secure the £750 to her, albeit for the benefit of her son. Thus it is convenient first to consider the preliminary objection on the assumption that the order derives in part from section 19 (2) of the Matrimonial Causes Act, 1950—which relates to maintenance to be secured "to the wife" and to which section 28 refers. If the order derives solely from section 26 (3), which relates to maintenance "for the benefit of the children," then, of course, section 28 does not apply and the executor, claiming as such, is to that extent the worse off when seeking to establish that rights survived to him.

What, then, is the position on the footing that section 19 (2) and section 28 apply to this case? Having due regard to the precise terms of section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, the right of a wife to apply after her husband's death, as against his executor, for the exercise of the court's discretionary powers to grant or increase secured maintenance, and the right of a husband's executor as against that wife to apply for the exercise of the court's discretionary powers simply to extinguish or diminish that maintenance, must to my mind stand on an equal footing as regards constituting claims which can or cannot be enforced against or by a personal representative of a deceased spouse. Applying *Dipple* v. *Dipple*,[28] it seems that none of them constitute such claims. Accordingly, even on the footing that the order in part derived from section 19 (2), the preliminary objection succeeds as the executor cannot as such ask the court simply to extinguish a right given by an order made under the subsection.

If the executor cannot thus pray in aid section 19 (2) and section 28, the preliminary objection succeeds even more clearly. Whether, when once the order for security has been complied with, those who have, in their personal capacities, a present or future interest in that security can in appropriate cases come to the court for certain other orders, either under section 28 or under some general jurisdiction of the court, is a point which does not arise here. Having regard, however, to the element of intended permanence inherent in orders made under sections 19 (2) and 26 (3), I would assume that even if the jurisdiction exists a court would only exercise it with considerable caution and in exceptional circumstances.

As regards the case now before me, it is right to state, in case the matter goes further, that, even if I had had jurisdiction, I would certainly not have altered the order of December 23, 1952, relating to the £750. One short answer to the application on the merits is that if the husband had been minded to cause the £750 to be taken in part or in whole against the son's share of the residue, he could have easily done so by way of codicil. I see no reason why the husband, who may well have provided the son of the first marriage with an education before leaving him a moiety of the residue, should not have been content that the son of the second marriage, in effect, should have a fund for educational or other expenses as well as his share in the residue. Still less do I see good reason for the court making an order which would deprive the son of that fund.

Accordingly I make, with regard to the maintenance to be secured to the wife for the benefit of the son, a declaration similar to that which I have made in respect of the maintenance to be secured for the wife.

As regards the second part of the executor's cross-application, counsel have wisely consented to an order being made that so much of the registrar's order as ordered the husband "to pay "or cause to be paid to the wife until Michael Sydenham Mosey "shall attain the age of 21 maintenance at the rate of £80 per

---

[28] [1942] P. 65.

1955

Mosey v. Mosey and Barker.

Sachs J.

"annum less tax" be discharged, and that in lieu there be an order that the executor do pay to the wife £80 per annum less tax for the maintenance of the said Michael Sydenham Mosey out of the income referred to in paragraph 9A of the will of the husband.

In the above circumstances I need only mention briefly the alternative application which Mr. Ifor Lloyd, by leave, filed in the course of the hearing—and by which he sought to vary the order of December 23, 1952, by specifying the real property which was to constitute the security. As he is right on his main point the alternative application does not arise: if he had been wrong and the order had not resulted in an enforceable claim arising, then *Dipple* v. *Dipple* [29] would have applied and no variation of the order could at this stage have been made.

Order accordingly.

Solicitors: *C. Grobel, Son & Co. for G. F. Mitchell, York; Jaques & Co. for Richardson, Parker & Swales, Scarborough.*

E. J.

---

[29] [1942] P. 65.

SIMMONDS *v.* SIMMONDS.

1955
Mar. 2, 3, 4;
May 13.

Lord Merriman P.

Husband and Wife—Maintenance—High Court—Divorce—Application within time prescribed—Wife's right to order not necessarily preserved—Erroneous practice—Duty of court—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 19—*Matrimonial Causes Rules*, 1950 (1950 *S.I. No.* 840/*L.*4), *r.* 44 (1).
Practice—Erroneous practice—Effect.

The rules governing the time for making applications for maintenance and providing for leave to apply out of time, and the cases dealing with those questions, must be read on the assumption that with due expedition the application will lead to an order which can fairly be said to be made "on the decree." There is no warrant for the notion that any rights whatever are preserved to the wife by the mere making of an application, albeit timely, which is deliberately allowed to lie dormant.

A wife was granted a decree nisi of divorce which was pronounced absolute on December 9, 1940; the petition contained no prayer for ancillary relief; but on January 8, 1941, she gave notice of an application for maintenance which was duly served in accordance with the rules. Although preliminary steps were taken, no appointment was made for a consideration of the application itself by the registrar.

In April, 1948, the parties entered into an agreement whereby the husband paid to the wife the sum of £250 in purported satisfaction, inter alia, "of any claim which the wife might have "against the husband by way of permanent maintenance," and the wife consented to an order being made in such form as the husband might require for the purpose of effectually discharging him from such claims. In October, 1954, the husband issued a summons calling upon the wife to show cause why her application of January 8, 1941, should not be dismissed pursuant to the deed:—

Held, (1) that the deed did not oust the statutory jurisdiction of the court, and did not bind the wife to consent to an order in the terms of the agreement.

Hyman v. *Hyman* [1929] A.C. 601; 45 T.L.R. 444; *Bennett* v. *Bennett* [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413; *Mills* v. *Mills* [1940] P. 124; 56 T.L.R. 561; [1940] 2 All E.R. 254 applied.

(2) That, by merely making and serving her application for ancillary relief in time, the wife had not done all that was necessary to ensure that any order made for her maintenance was made "on" her decree under section 19 of the Matrimonial Causes Act, 1950, and the recognized practice, by which she had admittedly been influenced, was wrong.

Sidney v. *Sidney* (1867) 36 L.J.P. & M. 73; *Stephen* v. *Stephen* [1931] P. 197; 47 T.L.R. 478; *Hasting* v. *Hasting* [1948] P. 68; 63 T.L.R. 564; [1947] 2 All E.R. 744 applied; Practice Direction [1954] 1 W.L.R. 898; [1954] 2 All E.R. 349 amended.

(3) That in the circumstances and particularly because the court itself had encouraged the erroneous practice by which the wife had been influenced she should be allowed to proceed with her application.

SUMMONS (adjourned into court).

The following statement of facts is taken from the judgment: The parties were married in September, 1931; there were no children of the marriage. On May 11, 1939, they entered into a deed of separation. On January 11, 1940, the wife presented a petition for divorce on the ground of the husband's adultery on many specified occasions in 1939 and 1940 with a named woman. There was no prayer for the exercise of the discretion of the court in the wife's favour, and there was no suggestion of any misconduct on her part. Although the husband entered a general appearance, he filed no answer. The decree nisi was pronounced on May 27, 1940, and was made absolute on December 9, 1940. The petition contained no prayer for the maintenance of the wife. On January 8, 1941, the wife gave notice of an application for maintenance within the time prescribed by the rules, which was duly served. On January 24, 1941, the husband filed an affidavit of means; an order for discovery by the husband was made on

February 6, 1941. Various other steps followed until, on June 9, 1941, the husband filed a further affidavit of means.

The registrar stated in the written judgment which was the subject of the appeal that from the affidavits filed it might be supposed that the husband, who was a member of a bookmaking firm, was not in a position to pay very much—at least, so long as the war lasted. It was suggested that, apart from the general effect on the business of a bookmaker caused by the curtailment of horse-racing during the war, the husband's position was specially affected by the fact that he was only a junior partner to his father, and, further, that the present proceedings had only arisen because his position had been greatly improved by the recent death of his father. No appointment before a registrar for the consideration of the wife's claim for maintenance was taken in 1941; and, so far as the registry was concerned, nothing more was heard of the application until May, 1954, after the lapse of almost 13 years.

On April 12, 1948, the parties entered into a deed in which it was recited first that there "might" be a liability for the payment of certain sums by the husband under the deed of separation already mentioned: secondly, that by virtue of an order, or orders, of the Divorce Division, certain sums "might" be due and payable by the husband to the wife; and, thirdly, that for the purpose of discharging any sum, or sums, which might be due as aforesaid, either under the deed of separation or orders of the court "whether already obtained or which might be "obtained in the future, the parties had agreed as follows: . . ."

There was, in fact, no ground for the suggestion that any sums whatever were due from the husband to the wife, either under the deed of separation or under any order of the court; but it was stated in the agreement that the husband, on the signing of the deed, had paid to the wife the sum of £250 "in full and final "discharge of all claims of whatsoever nature under and by virtue "of the said deed of separation, and any outstanding orders of "the Divorce Division, and in satisfaction of any claim which "the wife might have against the husband by way of permanent "maintenance."

By clause 2 of the agreement the wife consented to an order being made by the Divorce Court in such form as the husband might require for the purpose of effectually discharging him from the said claims, whether the same might have accrued or might accrue in the future.

On May 24, 1954, the wife's solicitors, after consultation with the registry, gave notice to the husband to file an affidavit as to

BIBL. LONDIN UNIV.

his means, which the wife had reason to believe had increased. She subsequently restored her application for maintenance for the purpose of obtaining directions, and on October 14, 1954, the registrar directed that affidavits should be filed.

On October 21, 1954, the husband issued a summons based on clause 2 of the agreement which called upon the wife to show cause why her application dated January 8, 1941, should not be dismissed, pursuant to the deed. The application was dismissed by Mr. Registrar Townley Millers and the husband appealed. The appeal was adjourned into court and the assistance of the Queen's Proctor invoked.

Roger Ormrod for the Queen's Proctor. Two questions arise. (1) Is the deed of April 12, 1948, effective to bar the wife's right to apply to the court for maintenance or to limit the jurisdiction of the court in ordering maintenance? (2) Can the wife, who served notice of an application for maintenance as long ago as 1941, having obtained no order, allow the application to lie for 13 years and then ask the court to make an order for maintenance which can be said to comply with section 19 of the Matrimonial Causes Act, 1950, in so far as it is made "on" the decree?

The vice of the deed lies in its attempt to compromise a future claim and it is submitted: (1) That the deed is of no effect. *Hyman* v. *Hyman*[1] decided that such deeds as this are quite ineffective to bar or limit the court's jurisdiction. (2) That clause 2 of the deed, by which the wife covenanted to consent to the making of an order by the Divorce Court discharging the husband from any claims by her which might have accrued or might accrue against him, is ineffective for another reason, namely, the fact that the wife might be compelled to consent would not in any way control the court. (3) That, in any event, there is no procedure by which the wife could be compelled to consent. The only remedy available to the husband would be to sue the wife for damages for breach of contract, but the damages would not flow from the wife's refusal, but from the order for maintenance made by the court.

The covenant in *Hyman* v. *Hyman*[2] preceded the divorce proceedings and the statutory right to maintenance accrued after the deed was executed, but the judgments delivered in that case holding that the wife's covenant not to apply for maintenance was unenforceable are not limited by these considerations. Whether the facts are as they were there or as in the present case the parties are purporting to limit the jurisdiction of the court. *Hyman* v. *Hyman*[3] is authority for the proposition that the parties cannot agree either not to invoke the power of the court or to control the power of the court when invoked, and it thereby overruled *Gandy* v. *Gandy*,[4] or possibly the latter case applies only to cases of judicial separation. In *Gaisberg* v. *Storr*[5] a promise by a wife not to ask for maintenance, made after the petition was filed but before the decree nisi, was held to be nudum pactum because no consideration moved from the wife; *Hyman* v. *Hyman*[6] was applied and explained. In *Ross* v. *Ross*[7] a statement by counsel at the pronouncement of the decree nisi that no application for maintenance would be made was held not to amount to an election not to apply. It was also said that even were an election made it would not be binding because of the decision in *Hyman* v. *Hyman*.[8] That case was also considered in *Combe* v. *Combe*,[9] in which a husband's promise to pay his wife a yearly sum, given between the date of the decree nisi and the decree absolute, was held to be not binding for lack of consideration. It was there said that even had the husband's promise been given in consideration of the wife's promise not to ask for maintenance that would not have amounted to consideration, being, according to *Hyman* v. *Hyman*,[10] invalid. Denning L.J. in his judgment[11] said that no agreement by a wife to forebear from applying to the court for maintenance could take away her right to do so, and that such agreements made before decree absolute were invalid except when serving as a basis for consent orders, because they were apt to be collusive.

---

[1] [1929] A.C. 601; 45 T.L.R. 444.

[2] Ibid.

[LORD MERRIMAN P. Is no such agreement valid?]

In *Bennett* v. *Bennett*[12] it was held that a wife's promise given before decree absolute not to ask for maintenance for herself and her child was void on the ground of public policy. Devlin J. at first instance held[13] that a wife could not compromise a claim for maintenance for her child, but the Court of Appeal[14] put their decision on the wider ground that covenants purporting to oust the jurisdiction of the Divorce Court as to maintenance were void and unenforceable as being contrary to public policy unless approved by the court.

---

[3] [1929] A.C. 601.

[4] (1882) 7 P.D. 77, 168.

[5] [1950] 1 K.B. 107; 65 T.L.R. 485; [1949] 2 All E.R. 411.

[6] [1929] A.C. 601.

[7] [1950] P. 160; 66 T.L.R. (Pt. 1) 755; [1950] 1 All E.R. 654.

[8] [1929] A.C. 601.

[9] [1951] 2 K.B. 215; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767.

[10] [1929] A.C. 601.

[11] [1951] 2 K.B. 215, 221–2.

[12] [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413.

[13] [1951] 2 K.B. 572; [1951] 1 T.L.R. 873; [1951] 1 All E.R. 1088.

[14] [1952] 1 K.B. 249.

[LORD MERRIMAN P. Is the promise by the husband void too?]

In *Hyman* v. *Hyman* [15] it was assumed that the husband was still bound—it may be that it is in the possibility of applying the doctrine of severability that lies the distinction between *Hyman* v. *Hyman* [16] and *Bennett* v. *Bennett* [17]: see the end of the judgment of Somervell L.J. in the latter case.[18]

The cases which have been referred to are the only authorities directly in point. Another line of cases—those which follow *Tulip* v. *Tulip*,[19] in which there was no covenant not to sue—are of interest. In *Dowell* v. *Dowell* [20] the court regarded the jurisdiction under the Matrimonial Causes Act, 1950, s. 23, as overriding an express provision not to sue in an agreement. In *Goodinson* v. *Goodinson* [21] it was sought on behalf of a husband to say that a deed providing for the maintenance of a wife and child was void because, inter alia, it contained a covenant by the wife not to commence or prosecute matrimonial proceedings. The Court of Appeal held that the covenant was illegal not as contra bonos mores, but merely in the sense that it was unenforceable, that it was therefore subject to the doctrine of severability and, as the wife had given other consideration, she was entitled to sue the husband on the rest of the deed. It is to be noted that Somervell L.J.,[22] referring to *Hyman* v. *Hyman*,[23] expressed the view that the considerations to be kept in mind by the court may be different with regard to deeds executed when the parties have merely their impending separation in mind from those which arise when divorce proceedings are contemplated.

[LORD MERRIMAN P. In view of that, must one not regard *Bennett* v. *Bennett* [24] with caution?]

In that case the covenant not to sue was the whole consideration, but in cases involving a separation deed there is also the consideration of living separately.

It is submitted that the only way of precluding a wife from applying to the courts for maintenance is to obtain a consent order that her application be dismissed or that any previously existing order be discharged, as was done in *Mills* v. *Mills*,[25] in which a wife sought unsuccessfully to go back to the Divorce Court for maintenance some seven years after a maintenance order in her favour had been discharged by consent. It was held that a new application would have to be made and that an application made on an order, launched so many years afterwards, would not have been an order made "on" a decree. See in particular the argument of Jowitt K.C. on the word "on"[26] and the emphasis in the judgment of Sir Wilfrid Greene M.R. that it was the order and not the application which had to be made "on" the decree.[27] In *Fisher* v. *Fisher*[28] and *Hasting* v. *Hasting*[29] leave to file applications was granted seven and 10 years respectively after the date of the decree absolute where the wife had been lulled into inaction by the existing circumstances. *Mills* v. *Mills*[30] decided three points: (1) that the court had jurisdiction to make orders only "on" the decree; (2) that "on" means "at" or "within a reasonable time after" the making of the decree; what is "a reasonable time after" the making of the decree depends upon the circumstances of the case; where a wife has been lulled into inactivity even 10 years may be considered to be a reasonable time; and (3) that the only way to preserve the wife's rights is to make a nominal order which can later be varied. In that case the petition for maintenance, having been dismissed, was over and done with, and it was held that the court had no jurisdiction some seven years later to make an order.

---

[15] [1929] A.C. 601.

[16] Ibid.

[17] [1952] 1 K.B. 249.

[18] Ibid. 259.

[19] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

[20] [1952] 2 All E.R. 141; [1952] W.N. 296.

[21] [1954] 2 Q.B. 118; [1954] 2 All E.R. 255.

[22] [1954] 2 Q.B. 118, 124.

[23] [1929] A.C. 601.

[24] [1952] 1 K.B. 249.

To sum up, it is submitted: (1) That the effect of the deed in the present case was to compromise both past and future claims for maintenance; it was, on the face of it, an agreement not to invoke the jurisdiction of the court and that infringed both the rules laid down by Lord Hailsham L.C. in *Hyman* v. *Hyman*.[31] Quoad severability, if there were past claims they could be compromised, but, as far as this summons is concerned, the only relevance of the deed is that it purports to shut out future claims. The only question is whether the deed was "an agreement either "(1) not to invoke the jurisdiction of the court, or (2) to control "the powers of the court when its jurisdiction is invoked."[31] (2) Clause 2, for the present purpose, can be ignored; it is as much an attempt to preclude the court as a covenant not to sue and is mere machinery. (3) Even if the wife did consent the court is in no way bound to dismiss this application. In *Lambert* v. *Lambert*[32] a consent order was made in terms that neither party was to be permitted to apply to the court to vary the order. The husband sought to reduce the order, and it was argued on his behalf that its terms could not be intended to interfere with any statutory right. Langton J., however, held that since the court had itself approved of the ouster of its own jurisdiction it was thereby bound. This is the only way in which the jurisdiction of the court can be excluded. (4) As to the effect of the word "on," the ratio decidendi of all the cases is that the court has no power except that given by the statute, the words of which are "on any decree." If an order has not been made, or has been set aside or dismissed, that is the end of it. The only "peg" upon which a future order can be hung is a nominal order which can be varied.

---

[25] [1940] P. 124; 56 T.L.R. 561; [1940] 2 All E.R. 254.

[26] [1940] P. 124, 125.

[27] Ibid. 130.

[28] [1942] P. 101; 58 T.L.R. 191; [1942] 1 All E.R. 438.

[29] [1948] P. 68; 63 T.L.R. 564; [1947] 2 All E.R. 744.

[30] [1940] P. 124.

[31] [1929] A.C. 601, 608.

G. C. Tyndale Q.C. and *G. H. Crispin* for the husband. It is submitted that, giving weight to the whole circumstances from 1941 onwards, the conduct of the parties, the time which has passed and the deed, the wife's application is dead unless it is a sound proposition that the mere filing of an application can keep the right alive. One reason why it cannot be the law that an order can be obtained at any time once an application within time has been made is that the respondent may remain in ignorance of the application.

[LORD MERRIMAN P. (after ascertaining that it was the view of counsel representing the various parties that the mere filing of an application for maintenance in the registry was sufficient to keep a wife's rights alive). This cannot be so, for the Matrimonial Causes Rules, 1950, r. 8, requires that if a notice of an application for maintenance is filed and there was no prayer for maintenance in the petition there must be service of the notice and Form 10 has to be served at the same time.]

Even if the husband had notice, as is conceded in this case, it is submitted that the application had become ineffective by 1954 and that the registrar should have dismissed it for want of prosecution. In *Kilford* v. *Kilford*[33] Barnard J. held that a registrar, who had adjourned a wife's application for maintenance sine die to be restored when an order of a court of summary jurisdiction made in her favour had been discharged, had acted incorrectly because of the words "on any decree."

---

[32] [1936] 3 All E.R. 20.

[33] [1947] P. 100; 63 T.L.R. 436; [1947] 2 All E.R. 381.

[LORD MERRIMAN P. Was not the real point of that decision that you cannot hold two maintenance orders in different courts, although I agree that it assists you as to the interpretation of "on any decree"?]

In *Robertson* v. *Robertson and Favagrossa* [34] Jessel M.R. said: "... it is not to be conceived that a period of more than a year "can be included in the word 'on.' 'On,' if not confined to the "making of the decree, must mean shortly after." That was a dictum because the decision of the court was that there were no grounds for interfering with the trial judge's dismissal of the wife's application for leave to file a petition for maintenance, but the words of the Master of the Rolls were approved and applied by the Court of Appeal in *Scott* v. *Scott*,[35] in which it was held that, where a wife had agreed to accept maintenance at the rate of the order for alimony pendente lite and took out a summons for leave to file a petition for maintenance some seven years later, any order that might be made would not be "at" or "within "a reasonable time after" the decree, and the summons was dismissed. In *Legge* v. *Legge* [36] the Court of Appeal held that Hill J. was wrong in thinking that *Scott* v. *Scott* [37] precluded him from exercising his discretion as to a wife's application for leave to file a petition for maintenance some four years after decree absolute. *Scott* v. *Scott* [37] was distinguished in *Fisher* v. *Fisher*,[38] in which a wife applied for leave to apply for maintenance seven years after the dissolution of her marriage when payments under an alimony order voluntarily continued and negotiations for a settlement had come to an end. The Court of Appeal, holding that leave ought to be given, pointed out that in *Scott* v. *Scott* [39] the wife, who was receiving £500 a year maintenance, was seeking to extract something more and that the court was careful to refrain from suggesting that the period of seven years which had elapsed between the decree and the wife's application in that case would have been a conclusive answer in other circumstances. Lord Greene M.R. explained his words in *Mills* v. *Mills* [40] as expressing merely the view that a lapse of eight years between a decree and an application for maintenance without any further facts would preclude the court from making an order "on" a decree. *Fisher* v. *Fisher*[41] was applied in *Hasting* v. *Hasting*,[42] where the Court of Appeal held that a wife who had applied for maintenance nearly 10 years after the decree nisi, when voluntary maintenance had terminated, had made her application within a reasonable time.

---

[34] (1883) 8 P.D. 94.
[35] [1921] P. 107; 37 T.L.R. 158.
[36] (1929) 45 T.L.R. 157.
[37] [1921] P. 107.
[38] [1942] P. 101; 58 T.L.R. 191; [1942] 1 All E.R. 438.
[39] [1921] P. 107.
[40] [1940] P. 124, 130.

From these cases it is not submitted that the passage of years is decisive and that the 14 years which has passed since the dissolution of the marriage in the present case as a matter of law precludes the wife, but it is contended that, in all the circumstances, an order in the wife's favour could not be made within a reasonable time. Reliance is placed on the following circumstances: (1) Although the wife made her application within time, for seven years, until the date of the deed of April, 1948, she was content to have nothing and do nothing. (2) She executed the deed by which she covenanted to forgo all claims. It is true that the covenant is not binding, but the husband was entitled to presume that she was honourable and would keep her promise and was thus lulled into a false sense of security. It is submitted that this is an element which ought to be considered. (3) It was open to her to have the matter disposed of on the basis of a *Mills* v. *Mills*[43] order, and this is what she should have done, taking a nominal order for maintenance. She allowed the deed to be executed in a permanent and binding form and then did nothing for six years, and every year that has passed casts a heavier burden upon her in this matter.

[LORD MERRIMAN P. That might not be so if she were receiving a reasonable maintenance meanwhile.]

In *Shott* v. *Shott*[44] Hodson L.J., considering the circumstances of that case, said that the order could not be made "on" a decree and that the court had no jurisdiction and no discretion. He appears to regard this as a proposition of law.

[LORD MERRIMAN P. In the present case is the discretionary power mine or that of the registrar?]

It is your Lordship's (*Stibbe* v. *Stibbe*[45]), and it is submitted that you have no jurisdiction to make this order, which is a matter of law. If, on the contrary, the matter is one of discretion, it is further submitted that the order should not be made.

Kennedy Kisch for the wife. First, there was no question raised before the registrar as to the effect of the words "on any

---

[41] [1942] P. 101.

[42] [1948] P. 68; 63 T.L.R. 564; [1947] 2 All E.R. 744.

[43] [1940] P. 124.

[44] [1952] 1 All E.R. 735; [1952] 1 T.L.R. 393.

[45] [1931] P. 105.

"decree"; the only point was whether the wife was barred by the deed.

[Lord Merriman P. If that is so, the registrar has omitted a material consideration, and since it is now within the judge's discretion whether to dismiss the application or not, I ought to deal with the matter on a proper basis.]

Then it is submitted that, upon the decided cases, what is required in circumstances such as those at present before the court is an application within time, and once that has been made it constitutes a "peg" upon which to hang all subsequent proceedings. It is conceded that there may be a distinction between a case where an application has merely been put upon the file and a case where steps have been taken upon the application. I have to show that the practice of the registry justifies the substituting of the words "on any application" for "on any "decree" as set out in the statute, and that the new approach to the registrar is in some way referable to the original application and is, therefore, made "on" the decree.

I would also seek to distinguish the effect of proceedings in which an application is merely put on the file and one in which further steps are taken, orders made, such as the order for discovery in the present case, and affidavits put upon the file. It is further submitted that the draftsman of the rules clearly thought that it was the application and not the order which had to be made "on" the decree, hence the form of the rules of which rule 44 of the Matrimonial Causes Rules, 1950, is the successor.

[Lord Merriman P. When was the time limit for applications introduced?]

By the Matrimonial Causes Rules, 1866, r. 95; there the time laid down was as soon as the decree was made or within one month thereafter except by leave of the judge. By rule 96 maintenance could be claimed as soon as the decree nisi was pronounced but not before.

There is no reported authority for the proposition that once an application has been made it is not open to proceed at any time.

[Lord Merriman P. Does not *Shott* v. *Shott*[46] assume that what matters is the making of the order? The decision of the judge in refusing to grant leave to file an application was upheld because the order could not have been made "on" the decree.]

Reliance is placed on the judgment of Somervell L.J. and in

[46] [1952] 1 All E.R. 735.

1955

SIMMONDS
v.
SIMMONDS.

particular the last two paragraphs.[47] Moreover, in the cases of *Scott* v. *Scott*[48] and *Fisher* v. *Fisher*,[49] cited in support of the judgment,[50] the references are to the application for the petition for maintenance being made within reasonable time.

[LORD MERRIMAN P. Speaking as a member of the rule-making authority, the position seems to me to be this: Section 8 of the Matrimonial Causes Act, 1950, enables the court to make an order "on any decree," and that is the only power which the legislature has given the court. Rule 44 is required as a matter of procedure in getting the application before the court. Its purpose was, as expressed in rule 95 of the Rules of 1866, to ensure that the application should be filed "as soon as (the "decree was made) or within one month thereafter." That limit has now been extended to two months. If the rule had not required the application to be made in the shortest time, would it not have been ultra vires?]

One then returns to the interpretation of the word "on." It is submitted that once the machinery is started by filing an application within two months anything done thereafter is "on" the decree. When the application had to be made within one month the order must often have been made after that period, yet it was still made "on" the decree.

[At this point the hearing was adjourned and upon its being resumed the following statement was made.]

[LORD MERRIMAN P. During the adjournment I have consulted with the Senior Registrar. It is true that applications for maintenance which have rested for a considerable time upon the file are heard in the registry without objection being taken and as a matter of course. It is not, however, correct that they can so rest without being served: see rules 8 and 9 (1) (*c*). I am told that the Senior Registrar invariably calls for an affidavit explaining delay when an application has been long on the file.]

It is submitted that on the authority of *Hasting* v. *Hasting*[51] the practice of the Senior Registrar is wrong and for two reasons: (1) The Matrimonial Causes Act, 1950, says that the order must be made "on" the decree. The application in the present case was made "on" the decree and the order when made will be made on the application. Hence there is a clear relation back analogous to a summons adjourned sine die in the magistrates' court where, when the matter is reopened, the subsequent order relates back to the original summons. (2) Leave is required only on making an application out of time, and the question of the court exercising its discretion arises only where leave has to be sought. Discretion cannot arise at a later date. In the present case the wife does not need to ask for leave and no question of the exercise of discretion arises, although the delay would be taken into account on the question of merits. It is for this reason that the registrar would not, in the circumstances of the present case, be entitled to ask for an affidavit explaining the delay, and it is this which distinguishes the present cases from all the authorities which have hitherto been considered.

---

[47] [1952] 1 All E.R. 738.

[48] [1921] P. 107.

[49] [1942] P. 101.

[50] [1952] 1 All E.R. 735, 736.

[51] [1948] P. 68.

[LORD MERRIMAN P. If there is no need to ask for leave to apply, does not the discretion arise on the actual hearing of the application?]

Reliance is placed on *Hasting* v. *Hasting*,[52] the effect of which is summarized in Rayden, 6th ed., p. 569—it is not for the registrar to consider the application of the words " 'on a (sic) " 'decree' as that is a matter for consideration on the application " for leave to file the application out of time." In that case a wife obtained a decree in 1936, the husband continued to pay her voluntary maintenance until 1946, when he ceased to do so, and the wife applied to the judge for leave to file an application, which was granted. Subsequently the registrar held that the lapse of time deprived him of jurisdiction to award maintenance to the wife. On an appeal by the wife Jones J. made an order for maintenance and this was upheld by the Court of Appeal. Tucker L.J., in delivering the leading judgment,[53] said that what Wallington J. had decided was that the application could be considered as having been made "on" the making of the decree and referred to the fact[54] that this was what the court had decided in *Fisher* v. *Fisher*.[55]

[LORD MERRIMAN P. Tucker L.J. begins his judgment by saying that the question is whether the court would have jurisdiction to make an order "on" the decree.[56] Moreover, did not *Hasting* v. *Hasting*[57] merely decide that the registrar could not override the judge's decision that the application was in time?]

It is submitted that what Tucker L.J. was saying in *Hasting* v. *Hasting*[57] was that Wallington J.'s order put the matter on the same footing as that in *Fisher* v. *Fisher*.[58]

---

[52] [1948] P. 68.
[53] Ibid. 71.
[54] Ibid. 72.
[55] [1942] P. 101.
[56] [1948] P. 68, 71.
[57] [1948] P. 68.
[58] [1942] P. 101.

1955

SIMMONDS
v.
SIMMONDS.

[LORD MERRIMAN P. Are you saying that the reviving of an adjourned or dormant application is the same case as varying a nominal order?]

Yes. Further, it is contended that although this court may not be bound by prevailing practice if it is contrary to public policy, in this particular case the wife has been misled.

[LORD MERRIMAN P. Would you say that she has been lulled to sleep by the prevailing practice?]

I would go further and say that she was encouraged by the prevailing practice. It is submitted, without prejudice to this argument, that " on any decree," by reason of the interpretation put upon the words by the decided cases, now means " on any " application." In view of the whole history of this case, the fact that the application was made in time, that it was served on the husband, that it was pursued up to a certain point, allowed to fall into abeyance and then revived, the wife should be allowed to proceed to the obtaining of an order " on " the decree.

Nevertheless, the submission is still pressed that according to the decided cases it is the application which must be made " on " the decree: *Mills* v. *Mills*.[59] The application was made within reasonable time within *Scott* v. *Scott*.[60]

[LORD MERRIMAN P. Those cases refer to applications for leave to apply, not to applications for maintenance.]

Reliance is also placed on the words of Sir Wilfrid Greene M.R.[61]: " . . . treating it as a new application not linked up to " some existing order of the court, or to some pending application " made in due time, it would be hopelessly out of time under " the section."

[LORD MERRIMAN P. Those words have to be read in the light of the subsequent reference [62] to *Stephen* v. *Stephen*,[63] and the reasoning was based on the circumstances of that case in so far as there had been a nominal order.]

The order for discovery may be a good peg on which to hang this application.

Tyndale Q.C. in reply. With regard to *Stephen* v. *Stephen*,[64] if the proposition of counsel for the wife were correct, it is strange that there was no suggestion from the Bench or from counsel that the wife had preserved her rights merely by filing her petition for maintenance in due course and, moreover, the Court of Appeal in making a nominal order adopted a futile and redundant

[59] [1940] P. 124, 129.

[60] [1921] P. 107.

[61] [1940] P. 124, 132.

[62] Ibid. 133–4.

[63] [1931] P. 197.

[64] Ibid.

procedure. If it should be held that it is open to the wife to proceed with her application on the ground that she has been lulled into inactivity by special circumstances, namely, the erroneous practice, then the burden should be upon her to show that this was actually so.

Ormrod replied.

Cur. adv. vult.

LORD MERRIMAN P. This appeal first came before me in chambers on December 16, 1954, when it became apparent that it raised questions of considerable public importance. Accordingly, I adjourned the appeal into open court, and invited the assistance of the Queen's Proctor. When the appeal was resumed on March 2, 1955, the Queen's Proctor was represented by Mr. Ormrod, for whose assistance and that of the Queen's Proctor I am greatly indebted; indeed, as I have already acknowledged, the case has been admirably argued by all counsel concerned.

[His Lordship stated the facts and said:] It may be well to emphasize that the wife had made her application well within the time prescribed by the rules, that so far as the "conduct of the "parties" was concerned there appeared to be no obstacle to the wife's claim for maintenance, and, whatever the affidavits may have disclosed as to the "ability of the husband," that the wife, instead of allowing her application to go to sleep, could have proceeded without difficulty to obtain at least a nominal order, which the court could subsequently have varied to meet any change in the circumstances.

[His Lordship referred to the recitals in the deed, and continued:] There was no ground for the suggestion made in the deed of April 12, 1948, that any sums whatever were due from the husband to the wife, either under the deed of separation of May 11, 1939, or under any orders of this court. When, therefore, it was stated in the agreement that the husband, on the signing of the deed, had paid to the wife the sum of £250 "in full "and final discharge of all claims of whatsoever nature under and "by virtue of the said deed of separation, and any outstanding "orders of the Divorce Division, and in satisfaction of any claim "which the wife might have against the husband by way of "permanent maintenance," it is plain that, in substance, the deed represented an attempt to settle, by a lump sum payment, the wife's outstanding claim for maintenance and nothing else. At any rate, if there were any other claims of "whatsoever nature" under the deed of separation or any outstanding orders, I have not been made aware of them. By clause 2 of the agreement the wife thereby consented to an order being made by this court in such form as the husband might require for the purpose of effectually discharging him from the said claims whether the same might have accrued or might accrue in the future. It is this clause that gave rise to the wording of the present summons of October 21, 1954, which calls upon the wife to show cause why her application dated January 8, 1941, should not be dismissed, pursuant to the deed in question.

I should add that it was suggested that the wife, who was said to have been without independent advice at the time, signed the deed in the belief that the agreement did not relate to maintenance at all, but was intended to settle some question of a rebate of income tax, to which she was entitled. At one stage of the argument it appeared that it might be necessary for me to hear evidence about the circumstances in which the deed came to be executed. However, as this appeal must, in my opinion, be decided on other grounds of more general application, I do not express any opinion at all about the merits of this suggestion. It is only necessary to say that if the deed gives effect to a mutual agreement to dispose of the wife's claim to maintenance for the lump sum of £250, Mr. Ormrod has satisfied me that it is ineffectual to oust the statutory jurisdiction of the court which is now contained in section 19 of the Matrimonial Causes Act, 1950. (See *Hyman* v. *Hyman* [1] and *Bennett* v. *Bennett*.[2])

As Lord Greene M.R. pointed out in *Mills* v. *Mills*,[3] there is no jurisdiction in the court to order payment to the wife of a lump sum. Such payment can only be consensual. That being so, he thought that it was undesirable that the court should direct the payment of such a lump sum, and that there was no necessity for the court to appear to be making an order which it has no jurisdiction to make at all. He suggested that a proper and regular procedure would be by making an order discharging an existing order for maintenance. Thus, if the agreed sum has already been paid in full satisfaction of any sums payable under that order, all that is necessary is a recital to that effect in an order by consent that the existing maintenance order be discharged. On the other hand, if the sum had not already been paid, the order for discharge could take the form that, upon payment of the agreed sum, the existing order should stand discharged, in which case it would merely be necessary to satisfy the registrar of that fact for the discharge of the existing order to become effective.

---

[1] [1929] A.C. 601; 45 T.L.R. 444.

[2] [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413.

[3] [1940] P. 124, 134, 135; 56 T.L.R. 561; [1940] 2 All E.R. 254.

It may well be, as Mr. Registrar Townley Millers stated, that if in 1948 or 1949 the husband had applied to dismiss the wife's application for maintenance, and the wife had consented, no difficulty would have arisen. He rightly appreciated, however, that to make an order in the absence of her consent would, in effect, be to make an order for a lump sum payment, which the court has no jurisdiction to do (*Mills* v. *Mills*[4]). In effect, therefore, he decided the summons on the ground that after the intervening lapse of time the wife is not disentitled to withhold her consent, notwithstanding the agreement.

The registrar, however, did not consider the question which, in my opinion, is the cardinal question in this appeal, viz.: whether the dismissal of the husband's summons might have the effect of leading to the making of an order for maintenance, which, after such a lapse of time, ought not to be regarded as being made "on the decree of divorce." It is right to say that it is common ground that no such point was taken before him. On the other hand, if the wife is not bound by the deed in relation to maintenance by reason of the alleged absence of a consensus ad idem, or otherwise, the deed disappears from the history of her claim for maintenance. This would mean that a continuous period of 13 years has elapsed while her application has been in abeyance, instead of two separate periods of seven and six years respectively before and after the deed of 1948.

The main contention put forward by Mr. Kisch, on behalf of the wife, was that, having made and served an application for maintenance in due course under the Matrimonial Causes Rules, without any necessity for obtaining the leave of the court to make an application out of time, she has done all that is necessary to ensure that any order made for her maintenance is made "on" the decree. In effect, the contention is that, whether the claim for maintenance is made in the petition itself or is made by a timely notice, the wife's right to proceed to the obtaining of an order is preserved, and, however protracted may be the delay in pursuing the application, that the court is only concerned with the bearing, if any, of such delay on the amount of the order; but has no discretion to hold otherwise than that the order is made, whatever the interval of time, "on" the decree, provided the application was originally made in the prescribed time.

---

[4] [1940] P. 124.

Mr. Kisch faced frankly the implication that this was substituting for the words of the statute "on any decree"—interpreted as they have been by the courts to mean "on any decree "or within a reasonable time thereafter"—the words: "on any "application made on a decree or within a reasonable time there-"after." In support of this contention he relied on a practice said to be regarded by practitioners generally as being recognized by the Principal Probate Registry, that a wife may make a timely application so as to "preserve her rights" to an order for maintenance, even though she has no intention of proceeding with it for the time being.

I confess that this statement took me completely by surprise, but it was confirmed categorically by counsel on all sides, speaking from their own very considerable experience. My inquiries from the registry tend to confirm the statements of counsel. It appears, however, that there is some diversity of practice, inasmuch as the Senior Registrar, at any rate, makes a point of calling for evidence explaining any considerable lapse of time between the dates of the application and the taking of an appointment to deal with it. It is sufficient for the moment to say that, as this case shows, this particular variation of the practice is by no means universal, and that Mr. Kisch has argued that there is no justification for it. He submits that delay, however protracted, is relevant solely to the question of amount. Leaving this aside, however, it is plain that the registry and practitioners have been acting on the assumption that the lapse of time between the decree and the moment at which the court actually makes an order for maintenance is of no consequence provided only that the wife has "preserved her rights" by making a timely application in one form or another.

It may well be that the number of cases affected by this practice at any given time was overestimated during the argument. For example, I am satisfied that, under the existing rules, the suggestion that a respondent husband can be kept in ignorance, maybe for years, of the very fact that any application has been made, is erroneous. Moreover, in the nature of things it would seem to be unlikely that there is any considerable number of cases in which wives who have a real claim for maintenance would allow a timely application to become dormant, and those in which the husband stands by and allows the application to hang over him indefinitely must, presumably, be still fewer. Be that as it may, this case may be useful if it induces parties who are affected to put matters in order.

Mr. Kisch rightly admitted that, if the practice is erroneous, the court could not be bound by it. At the same time he invoked the existence of the practice as a cogent circumstance in relation to the question whether the court can hold that an order made after a delay encouraged by the practice is nevertheless made "on the decree." I will return to this aspect of the matter later.

In support, however, of his argument that it is the date of the application that matters in relation to the date of the decree, and not the date of the order, he pointed out, quite truly, that most of the cases dealing with the limitation imposed by the words "on any decree" relate to applications made out of time for leave to file a separate petition for maintenance, as was formerly necessary, or, more recently, for leave to give notice of application for maintenance.

This is no doubt true; but it seems to me that it is almost inevitable that it should be so. Some process must be prescribed to lead to an order for maintenance, and it is obvious that the process must be initiated by some form of application.

I realize that in several of the cases dealing with leave to make application for maintenance out of time there are passages which refer to the application, rather than to the order, as being made on the decree, but in *Mills* v. *Mills* [5] Lord Greene M.R. said: "At the outset one matter must be remembered with "regard to the jurisdiction of the court under the provisions of "section 190 [of the Supreme Court of Judicature (Consolidation) Act, 1925], to which I have referred. That jurisdiction "can only be exercised on any decree for divorce or nullity of "marriage. Accordingly, if an application is made by a wife of "which it can fairly be said that an order made upon it would "not be made 'on' such a decree, the court has no power to "accede to the application." Conversely, it follows, in my opinion, that the court ought not to accede to an application for leave to apply out of time for maintenance unless it can fairly be said that the order made upon it would be made "on" the decree, in the sense that it would be made within a reasonable time after the decree, having regard to all the circumstances of the case: see *Scott* v. *Scott*,[6] *Fisher* v. *Fisher*,[7] *Hasting* v. *Hasting*[8] and *Shott* v. *Shott*.[9]

---

[5] [1940] P. 124, 129.

I appreciate, however, that this leaves untouched the question whether a timely application for maintenance deliberately allowed to become dormant can fairly be said to lead to an order made on the decree.

The statutory condition that the order itself shall be made on the decree has been constant throughout, beginning with section 32 of the Matrimonial Causes Act, 1857, down to section 19 of the present Matrimonial Causes Act, 1950.[10] Indeed, the wording of this last section emphasizes the point, inasmuch as the three subsections dealing respectively with alimony pendente lite, a secured provision for the wife, and with the payment of ordinary periodical maintenance, all begin with the word "on."

It is for the rule-making authority for the time being to prescribe and regulate the process; but it must act intra vires of the statute.

It may be useful at the outset to consider the practice in force at the time of the passing of the Matrimonial Causes Act in June, 1866. By section 1 of that Act the court was, for the first time, empowered to make an order on a husband to pay to the wife during their joint lives such monthly or weekly sums of maintenance as the court might think reasonable, with the proviso that the court might discharge, modify or suspend the order temporarily, and again revive the same order, wholly or in part, as to the court might seem fit.

The Act was passed, as appears from the preamble, because the experience of nine years had shown that the securing of a gross or annual sum, as provided by section 32 of the Act of 1857, was not invariably the best way of providing maintenance for a wife, since it sometimes happened that a decree for dissolution of marriage was obtained against a husband who had no property on which payment of any such gross or annual sum could be secured, but who, nevertheless, would be able to make a monthly or weekly payment to the wife during their joint lives.

---

[6] [1921] P. 107; 37 T.L.R. 158.

[7] [1942] P. 101; 58 T.L.R. 191; [1942] 1 All E.R. 438.

[8] [1948] P. 68; 63 T.L.R. 564; [1947] 2 All E.R. 744.

[9] [1952] 1 T.L.R. 393; [1952] 1 All E.R. 735.

[10] Matrimonial Causes Act, 1950, s. 19: "(1) On any petition for "divorce or nullity of marriage, the "court may make such interim orders "for the payment of alimony to the "wife as the court thinks just.

"(2) On any decree for divorce or "nullity of marriage, the court may ". . . order that the husband shall, to "the satisfaction of the court, secure "to the wife such gross sum of "money or annual sum of money for "any term . . . as, having regard to "her fortune, if any, to the ability "of her husband and to the conduct of "the parties, the court may deem "reasonable. . .

"(3) On any decree for divorce or "nullity of marriage, the court may ". . . by order direct the husband to "pay to the wife, during their joint "lives, such monthly or weekly sum ". . . as the court may think "reasonable . . ."

It was this Act also which provided that no decree nisi for a divorce should be made absolute until after the expiration of six months, unless the court fixed a shorter time. Section 7 of the Matrimonial Causes Act of 1860 had first introduced the decree nisi, not to be made absolute for three months, in place of the single decree provided for by the Act of 1857.

From the fact that the substance of section 32 of the Act of 1857 is recited almost verbatim in the preamble of the Act of 1866, and that section 1 began with the words " in every such " case," it is clear that the words " on any such decree " are imported from section 32 into the new provisions for the periodical payment of maintenance. So things remained until both sections were repealed by and consolidated in section 1 of the Matrimonial Causes Act, 1907, repealed and re-enacted in section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, and so they remain today in section 19 of the Matrimonial Causes Act, 1950.

On December 26, 1865, Lord Penzance, who was then, as Judge Ordinary, the rule-making authority, made a comprehensive revision of the rules and regulations, to come into force on January 11, 1866. The relevant rules in the section headed " Maintenance and Settlements " are rules 95 and 96. Ignoring the references to the settlement of a wife's property in section 45 of the Act of 1857, and to the variation of settlements in section 5 of the Act of 1859, the effect of these two rules was that applications to the court to exercise the authority given by section 32 of the Act of 1857 were to be made in a separate petition, which might be filed as soon as a decree nisi had been pronounced, but not before, and must, unless by leave of the judge, be filed within one month thereafter.

As I have already said, when these rules came into force, the power to order weekly or monthly payments of maintenance had not been added to the powers given by section 32 of the Act of 1857, and the interval between decree nisi and decree absolute was still three months. These rules, however, were still in full force when the second (1868) edition of Browne's treatise on the Principles and Practice of the Court for Divorce and Matrimonial Causes was published, and remained in force at the time when the fifth edition was published by Mr. Powles in 1889. Meanwhile, as appears from the text of the second edition (at p. 143), it was considered that it was obligatory to embody any provision for the wife under section 32 in the actual decree dissolving the marriage: that is to say, the decree absolute and not the decree nisi: see *Charles* v. *Charles* [11]; *Sidney* v. *Sidney*.[12] But the latter case was expressly reversed and the former impliedly overruled by the House of Lords: see *Sidney* v. *Sidney*.[13] The decision arose out of an attempt to appeal to the House of Lords against the amount of maintenance embodied in the decree absolute. The point of the decision was that, although the appeal would lie against the decree of dissolution itself, that part of the decree which dealt with maintenance was separate and subsidiary.

Lord Westbury said [14]: "if, as a matter of convenience and "to save expense, one order only is drawn up, or one decree "recorded, in which the court, having first finally pronounced for "the dissolution of the marriage, goes on to exercise the supplementary jurisdiction of ordering an allowance, still that second "part of the decree, though for convenience it is all contained "in one piece of parchment, is in reality the exercise of a "different jurisdiction and of a different judicial power and consideration; and the one jurisdiction and its exercise is wholly "distinct from the other jurisdiction and the exercise thereof. It "would be absurd, therefore, and we should be allowing ourselves "to be caught by mere forms of expression, if we were to hold "that that portion of the decree which relates to the maintenance "is a decision of the court upon a petition, that is, a petition for "the dissolution of a marriage. As I have already observed, the "petition for the dissolution of the marriage must be finally "decided first, before the right to exercise the auxiliary or "supplementary discretionary power can by possibility arise. It "is absurd, therefore, to confound the one thing with the other, "and to ascribe to the discretionary order which follows upon "the judgment the character of being an order pronounced upon "a petition for the dissolution of the marriage. In fact, "although it may not be so in terms, it is really an order "pronounced upon an application to the discretionary power of "the court, which application can only be made after the other "and more important jurisdiction has been exercised."

Thus, although the supposed obligation to embody the maintenance order in the decree was shown to have been erroneous, the provision which enabled the application to be made as soon as the recently instituted decree nisi had been pronounced tends to emphasize the necessity for proceeding to the conclusion of the requisite inquiries as expeditiously as the circumstances of the case permitted.

---

[11] (1866) 36 L.J.P. & M. 17.

[12] (1866) L.R. 1 P. & M. 78.

[13] (1867) 36 L.J.P. & M. 73.

[14] Ibid. 75.

In my opinion it is inconceivable, apart altogether from the erroneous idea that it was necessary to embody the order for maintenance in the decree itself, that Lord Penzance, in making the rules in 1865, even contemplated that the only material consideration was that the application, as distinct from the resultant order, should be made " on " the decree.

The same observation applies to section 29 of the Matrimonial Causes Act, 1950, reproducing section 10 (1) of the Matrimonial Causes Act, 1937, and the rules thereunder, whereby the necessity for a separate petition for maintenance was abolished, and it was provided that a prayer for maintenance might be included in the petition for divorce or nullity. There is, however, the significant proviso that, apart from an interim order, no order shall be made unless and until a decree nisi has been pronounced, and no such order, save in so far as it relates to the preparation, execution or approval of a deed or instrument, and no settlement made in pursuance of any such order, shall take effect unless and until the decree is made absolute. The manifest object of this provision was to facilitate the preliminary investigations, while at the same time emphasizing the vital connexion between the effective order for maintenance and the decree absolute.

If no prayer for maintenance is included in the petition the wife, under rule 3 (3) of the Matrimonial Causes Rules, 1950, can file a notice of application. But it is necessary to serve, either with the petition or the notice of application, as the case may be, notice in the appropriate form, calling upon the husband to file evidence of means. The application for maintenance, when no prayer therefor is included in the petition itself, may be made after the time for entering an appearance to the petition has expired, but not later than two months after the final decree except by leave (rule 44 (1)). The period had been extended from one month to two months by the rules of 1947, which also abolished the necessity for making the application to a judge.

It is unnecessary to examine in detail the cases in which the words " on any decree " have been interpreted. A very cursory summary will suffice. In 1883, in *Robertson* v. *Robertson and Favagrossa*,[15] Jessel M.R. said [16]: " It is not necessary to express

---

[15] (1883) 8 P.D. 94.

[16] Ibid. 96.

1955

SIMMONDS
v.
SIMMONDS.

Lord Merriman P.

" an opinion as to what time should be allowed, but it is not to " be conceived that a period of more than a year can be included " in the word 'on.' 'On,' if not confined to the time of making " the decree, must mean shortly after."

In *Scott* v. *Scott*[17] the Court of Appeal held that " shortly " after " must be defined as " within a reasonable time after " having regard to all the circumstances of the case." In that particular case the circumstances were held to preclude the granting of leave after seven years.

On the other hand, in *Fisher* v. *Fisher*,[18] distinguishing *Scott* v. *Scott*,[19] the wife was allowed to apply after seven years on the ground that she had refrained from making her application earlier in reliance on a continuance of alimony paid by the husband and an alleged undertaking to settle certain property on her. Lord Greene M.R. said that it was fair to regard the wife as having been lulled into a sense of security by what had taken place.

In *Hasting* v. *Hasting*,[20] ten years elapsed between the decree and leave to make the application, in circumstances to which I will recur shortly.

Finally, in *Shott* v. *Shott*[21] it was recognized that the decisions on the consideration of the words " on any decree " showed great latitude, and that it was not possible to lay down any general rule that an application 18 years out of time must be refused, although the decision of the judge to refuse the application was, in the circumstances of the case, upheld.

On final analysis, Mr. Kisch's contention that what matters is the relation between the time of the making of the application and the decree appears to depend upon a couple of passages in the judgment of Tucker L.J. in *Hasting* v. *Hasting*,[22] in which he spoke of the *application* being made within a reasonable time so as to enable the court to consider *it* (my italics) as being made on the making of the decree.

Before considering *Hasting* v. *Hasting*,[23] however, it will be useful to refer to an earlier decision of the Court of Appeal in *Stephen* v. *Stephen*.[24] That case dealt with the then prevailing attempt to keep alive the jurisdiction to deal with maintenance by giving " liberty to apply."

It was decided at a time when it was necessary to present a separate petition for permanent maintenance, and, I may add, at a time when the practice of the Ecclesiastical Courts to give the wife one-third of the joint incomes was more generally followed than is now the case. The report shows that the wife's petition in that behalf was presented "in due course." On the basis that two children of the marriage, of whom the wife had the custody, were entitled to a substantial income arising out of funds provided by the husband's father under the marriage settlement, that the husband had a yearly salary of £350 free of income tax under an engagement as secretary which was terminable at a month's notice, and the wife had a small income of about £25 a year, the registrar made an order for the husband to pay the wife, by way of maintenance of the children, £120 per annum free of tax. But the order proceeded: "No order for the maintenance of the "wife but liberty to apply thereon." These words, "liberty to "apply," were evidently intended to keep the wife's application open without the taking of fresh proceedings. On appeal from the registrar, Lord Merrivale P. ordered that the words "liberty "to apply" should be expunged from the order on the ground that it was obvious that the means of the wife exceeded the amount of any order that would ordinarily be made on the basis of the total joint income, and that no case had been shown for keeping the matter open. The wife subsequently applied to vary the order of the registrar by directing that a nominal sum might be ordered to be paid as permanent maintenance in order to preserve the jurisdiction of the court to increase the amount in the event of an increase in the husband's means. Langton J. dismissed the wife's application, considering himself bound by the previous decision of the President. Special leave was granted by the Court of Appeal to appeal against the two orders of the President and Langton J. The Court of Appeal held that the President was right in expunging the words "liberty to apply," but that he did so for the wrong reason, as he had ignored the fact that the husband's income was subject to the chances and changes of life and of his business, and that he was wrong in holding that in the case of periodical payments of maintenance, as distinguished from a secured provision, the legislature had intended that finality in the financial position should be reached at the time of the decree of divorce. But they held that it was irrelevant and incorrect to insert the words "liberty to apply" in the order, and that these words did not enable the wife at a subsequent date to make an effective application for increased maintenance.

---

[17] [1921] P. 107.
[18] [1942] P. 101.
[19] [1921] P. 107.
[20] [1948] P. 68.
[21] [1952] 1 T.L.R. 393.
[22] [1948] P. 68, 71, 72.
[23] [1948] P. 68.
[24] [1931] P. 197

In dealing with the two appeals, Lord Hanworth M.R. said [25]:

---

[25] [1931] P. 197, 203.

"In short, therefore, the question before us is this: Is this a case "in which an order should be made under section 190, subsection "(2), of the Act of 1925, in order to enable the court to retain its "jurisdiction and thereby safeguard the possibility of a change "in the circumstances under which it might become right to "order a sum to be paid to the wife if the husband should obtain "an increase in his salary, or correlatively to enable the husband "to bring the matter before the court under the section if his "income should be diminished?"

Accordingly, the court allowed the appeal from Langton J., and ordered that the husband should pay to the wife maintenance at the rate of 2s. 6d. a month.

The express object of the Court of Appeal in making a nominal order in a case in which the original application was made in due time was to enable the wife to obtain an increased order if circumstances changed in her favour; but if it is the law that the making of a timely application enables the wife to proceed upon her application at any time favourable to herself, that object could have been attained by simply striking out of the registrar's order the words "No order for maintenance of the "wife," and allowing her application to stand adjourned, since the intermediate stage of nominal order and variation was unnecessary if, apart from the useless words "liberty to apply," the wife's original application could lead to an order at any time, provided the words "No order for maintenance of wife" were struck out.

In *Hasting* v. *Hasting*,[26] for about nine years after the decree absolute obtained by the wife, in whose favour the court had exercised discretion, the husband had voluntarily paid maintenance of varying amounts. On the cessation of payment the wife applied, as was then necessary under rule 44 (1), to a judge for leave to make an application for maintenance out of time. Leave was granted by Wallington J., but when the application came before the registrar, the latter decided that the lapse of time between the decree and the application deprived him of jurisdiction to entertain it. He said, however, that he would have awarded 30s. a week if he had had jurisdiction. Jones J. reversed the registrar's decision, and made an order for that amount. His decision was upheld by the Court of Appeal, on the ground that Wallington J., by granting leave to apply out of time, had thereby decided that the application was, in the circumstances, an application made on the decree within the meaning of the statute, thus giving the registrar jurisdiction to entertain and report upon it. At the same time, the court held that the delay was a matter to be taken into account in considering the merits of the application.

---

[26] [1948] P. 68.

Tucker L.J., delivering the leading judgment, with which Bucknill L.J. agreed, said[27]: "It is to be observed that the "jurisdiction of the court under section 190, subsection (1), is to "make an order 'on any decree.' Questions have arisen from "time to time as to what period of time must, or may, elapse so "as to render it impossible for the court to say that it is making "an order 'on' the decree. As a great deal more than one "month had elapsed from the making of the decree it was "necessary to obtain the leave of the judge before this application "by the wife for maintenance could be made, and, accordingly, "application was made to Wallington J. Under the rules, these "applications are not ex parte, but are considered in the presence "of both parties. Wallington J., having considered the affidavits "filed by both sides, gave leave to make the application. The "result of that, in my view, was that he decided that, in the "circumstances of this particular case, the *application*" (my italics) "could be considered as being made on the making of the "decree, and that thereafter it would be for the judge in the "Divorce Division who had to consider the application on its "merits, after considering the report made by the registrar, to "decide whether or not, in the circumstances of the case, an "order for maintenance should or should not be made."

After referring to *Fisher* v. *Fisher*,[28] in which Lord Greene M.R. qualified certain observations that he had made in *Mills* v. *Mills*,[29] Tucker L.J. said[30]: "Lord Greene M.R. then went on "to consider the circumstances of that case and came to the "conclusion that the application was made within a reasonable "time so as to enable the court to consider *it*" (my italics) "as "being made on the making of the decree."

The reasoning of Tucker L.J.[31] for upholding the reversal by Jones J. of the decision of the registrar that he had no jurisdiction and for holding that the question of jurisdiction is decided when the application for leave to apply for maintenance out of time is granted is in exact accordance with the reasoning of Lord Greene M.R. in the passage already quoted from his judgment in *Mills* v. *Mills*.[32] After all, on such an application it is open to the court, as on any other application for an extension of time, to impose restrictions which will ensure that the matter proceeds expeditiously to a conclusion. It is plain, in my opinion, that Tucker L.J. used the word " application " and the word " it " in the passages which I have just quoted from his judgment [33] as meaning an application for leave to make out of time an application for maintenance, in respect of which it could fairly be said that any order for maintenance made thereon would be an order made " on the decree." But that is a very different thing from saying that an order made after years of unwarrantable delay can fairly be said to be made on a decree merely because the application therefor was made in due time without any necessity to apply for leave.

---

[27] [1948] P. 68, 71.
[28] [1942] P. 101.
[29] [1940] P. 124.
[30] [1948] P. 68, 72.
[31] Ibid. 73–5.
[32] [1940] P. 124, 129.

The same point clearly appears from the opening words of the judgment of Cohen L.J.[34]: " I agree. At the end of his argument " Mr. Beyfus said that the wife had to surmount two hurdles, " first, the procedural hurdle under rule 44, and secondly the " statutory hurdle under section 190. He said that Wallington J. " had no doubt successfully got the wife over the first hurdle, " but that it was still open to Jones J., on the hearing of the " wife's application, to reject it on the ground that he had no " jurisdiction to make an order. I agree with my brethren in " rejecting this argument . . ."

In my opinion, therefore, the true conclusion is that the rules governing the time for making applications for maintenance and providing for leave to apply out of time, and the cases dealing with these questions, ought to be read on the assumption that with due expedition the application will lead to an order which can fairly be said to be made " on the decree," and that there is no warrant for the notion that any rights whatever are preserved to the wife by the mere making of an application, albeit timely, which is deliberately allowed to lie dormant.

Finally, I ought to refer in passing to a Practice Note of May 21, 1954,[35] which reads as follows: " In future applications " under Matrimonial Causes Rules, 1950, r. 44 (1), for leave to " apply for ancillary relief out of time may be made to a registrar " ex parte on affidavit. Thereupon, the registrar will decide " whether to give leave forthwith or to require a summons to be " issued and served on the respondent, the summons to be " returnable before a registrar or a judge as he may direct." This Practice Note, for which I take the responsibility, was intended to ensure that the explanation for any delay should be

[33] [1948] P. 68, 71, 72.

[34] Ibid. 75, 76.

[35] [1954] 1 W.L.R. 898; [1954] 2 All E.R. 349.

given by evidence on oath, and that in doubtful cases the court should not give leave to make such applications out of time without giving the respondent the opportunity to be heard. Having regard, however, to what has already been said about the significance of the decision in *Hasting* v. *Hasting*,[36] and to the fact that that case was decided on the basis that an order for leave to apply for maintenance out of time is made inter partes,[37] I have come to the conclusion that it is undesirable that such applications should ever be made ex parte, and I direct, therefore, that the words "ex parte" be deleted from the first sentence of the above Practice Note, and that the second sentence be cancelled.*

On the basis that it is accepted that the practice has existed for many years, Mr. Ormrod did not contest the view that it was a circumstance to be taken into account in connexion with the lapse of time since the making of the application. Mr. Kisch, naturally, adopted the same position on behalf of the wife, but, of course, without prejudice to his contention that the practice itself is correct. Mr. Tyndale, on behalf of the husband, agreed that the existence of the practice might be a circumstance to be taken into account, but, so far as the present case is concerned, submitted that it should only be so regarded if this wife could prove that the practice was the cause of her inaction. In other words, he submitted that the practice is only relevant in any given case if it has actually had the effect, to use the words of Lord Greene M.R. in *Fisher* v. *Fisher*,[38] "of lulling the wife "into a sense of security." I appreciate the force of the analogy, but if, as is suggested, it is the case that parties and their legal advisers have allowed timely claims for maintenance to lie in abeyance because there has been no immediate urgency, I think that, apart from the manifest inconvenience of flooding the court with numerous inquiries about the extent to which individual litigants have been affected by the existence of the practice, if the court itself has encouraged an erroneous practice, it should not put the burden upon litigants, but should itself shoulder the responsibility squarely, correct the error, and do whatever is possible to ensure that the mischief is avoided in future.

In this case, admittedly, no point was taken before the registrar about any lack of jurisdiction based upon the words "on any "decree," nor did he himself inquire about the cause of the delay

[36] [1948] P. 68.

[37] Ibid. 71.

* See Practice Direction [1955] 1 W.L.R. 703.

[38] [1942] P. 101.

1955

SIMMONDS *v.* SIMMONDS.

Lord Merriman P.

in the prosecution of the wife's claim. On the contrary, as I have already stated, the wife's present solicitors were advised by a responsible officer of the registry that all that was necessary in order to reinstate her application was to serve the husband with a fresh notice to file evidence. On the other hand, the husband's summons to dismiss the wife's application is based solely on the deed of 1948—that is to say, upon the misconception that the court could order the wife to consent to the dismissal of her claim for maintenance as being barred by the deed. The wife's present solicitors have plainly been influenced by the practice in question, from the moment they assumed conduct of her affairs in May, 1954.

In my opinion it is altogether unnecessary, at this stage, to go further back. I shall therefore order that the wife be permitted to proceed with her application, leaving it to the registrar to consider what effect should be given to the history of delay in considering the merits of the application.

Appeal dismissed.

Solicitors: *Landau & Co.; Moodie, Randall, Carr & Miles; The Queen's Proctor.*

E. J.

1955 *June* 20, 21; *July* 1.

Karminski J.

BEST *v.* BEST.

Husband and Wife — Divorce — Settlement — Variation — Position of adopted child — Interests of children — Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 25—*Adoption Act,* 1950 (14 *Geo.* 6, *c.* 26), *ss.* 10 (2), 13 (2) (*a*).
Adoption.

A wife who had been granted a decree of divorce applied under section 25 of the Matrimonial Causes Act, 1950, to vary an antenuptial settlement, in which provision was made for the parties during their lives and after their deaths for the issue of the marriage, by extinguishing the husband's interest in that settlement, by accelerating the interests of the only child of the marriage and by providing that the adopted child of the parties should benefit under the settlement as though he were issue of the marriage. It was contended that it was desirable in the interest of the children, who regarded each other as brothers, to preserve a feeling of equality between them:—

Held, (1) that since, in the circumstances, proper provision for the wife and child of the marriage was made under an agreed order for maintenance (which also made provision for the adopted child) no further provision was necessary; and there was no reason to accelerate the child's interest, or to postpone or extinguish that of the husband.

Prinsep v. *Prinsep* [1929] P. 225; 45 T.L.R. 376; [1930] P. 35, 47; 46 T.L.R. 29 applied.

(2) That although under section 25 the court is empowered to make such order as it thinks fit in the judicial exercise of its discretion, and although importance must be attached to the contention that the two children should be placed on a basis of equality, it was undesirable that such equality should be obtained at the price of so great a financial sacrifice on the part of the child born to the parties.

(3) That the application should accordingly be dismissed.

Garforth-Bles v. *Garforth-Bles* [1951] P. 218; [1951] 1 T.L.R. 449; [1951] 1 All E.R. 308 considered.

Although the general tenor of the Adoption Act, 1950, was to put adopted children as nearly as possible in the position of children of the marriage, the Act by itself did not bring into a will or settlement a child adopted after the execution of that will or settlement.

APPLICATION to vary a registrar's report as to variation of a settlement.

The following statement of facts is taken from the judgment: By an ante-nuptial settlement made on January 18, 1935, the husband brought into settlement investments worth approximately £4,000 at the date of the hearing and a policy of assurance on his life for the sum of £5,000 payable on December 5, 1970, or on his previous death. The husband covenanted to pay, and paid, the annual premium on this policy. By the settlement the income from the whole of the settlement was payable to the wife during her life and, after her death, to the husband for his life. After the death of both the wife and the husband the trustees were to stand possessed of the trust fund in trust for all or such one or more exclusively of the others of the issue of the said marriage whether children or remoter issue at such time and, if more than one, in such shares for such interests and with such trusts for their respective benefit and such provisions for their respective advancement (but during the lives or life of the husband and wife and the survivor of them only with their his or her consent) and maintenance and education and otherwise at the discretion of any person or persons and upon such conditions with such restrictions and in such manner as the husband and wife should by any deed or deeds revocable or irrevocable jointly appoint and in default of and subject to any such appointment then as the survivor of them should in like manner or by will or codicil appoint and in default of and subject to any such appointment in trust for all the children or child of the said marriage who being male attained the age of 21 years or being female attained that age or married and if more than one in equal shares.

The husband and wife were married on January 19, 1935. On June 1, 1945, they adopted, by an order of the county court, a male child, Timothy, born on December 7, 1944. A child of the parties, Anthony, the lawful issue of the marriage, was born on October 7, 1947. On December 3, 1954, a decree dissolving the marriage on the ground of the husband's adultery was made absolute. On February 3, 1955, the wife by notice applied to the court to vary the settlement by extinguishing all the rights, powers and interests of the husband therein as from the date of the decree absolute.

On March 22, 1955, Mr. Registrar Kinsey reported on the wife's application and submitted, inter alia, that the wife's application be dismissed. On April 1, 1955, the wife gave notice asking to vary the registrar's report by (1) extinguishing the interests of the husband under the settlement as though he were dead; alternatively (2) accelerating the interests of the child Anthony under the settlement and postponing the interests of the husband thereunder; and/or alternatively (3) providing that the adopted child Timothy should benefit under the settlement as though he were issue of the parties.

Before the hearing of the application to vary the settlement the parties agreed to an order for the wife's maintenance and for that of the two children at the rate of £2,000 per annum less tax for the wife during joint lives, for Anthony at the rate of £250 per annum less tax, and for Timothy at the rate of £500 per annum less tax. The difference in the payments to the children was due solely to the fact that Timothy was at a boarding school while Anthony was still at home. At the request of all the parties, including the infants, the court directed that the order for maintenance, which was agreed but which had not been made pending the decision on the application to vary, be drawn up. In the result, therefore, the wife would have for herself £2,000 per annum by way of maintenance and would also receive about £175 per annum, being the income from the settlement.

P. Malcolm Wright Q.C. for the wife, and *James Comyn* for the child Timothy, substantially adopting each other's arguments.

It is conceded that section 13 (2) of the Adoption Act, 1950,[1] does not bring the child Timothy into the settlement which it is now sought to vary, he having been adopted after the making of that settlement. It is submitted, however, that the court has power to vary the settlement in his favour by virtue of section 10 (2)[1] of the Act, which states that, in respect of the jurisdiction of the court to make orders as to custody, maintenance and education, adopting spouses shall stand to each other and to the adopted child as if they were the lawful father and mother and the child shall stand to them in a like relationship. The tenor of the Adoption Act, 1950, is to put the adopted child in the position of a child of the marriage where the adopters are husband and wife, and it is submitted that section 10 (2) should be read as a background to section 13 (2).[1]

Apart from the operation of the Adoption Act, 1950, it is submitted that the court has power under section 25 of the Matrimonial Causes Act, 1950, to vary the settlement in favour of Timothy. The section gives to the court the power to "make "such orders . . . as the court thinks fit." There would be difficulty in asserting that such a variation might be made for the benefit of a person outside the marriage were it not for a line of cases decided under the predecessors of section 25 which have held that the court, in varying such a settlement, may create a power enabling the children of future marriages to share in the settled fund. [Reference was made to *Atkins* v. *Atkins and Urquhart*,[2] *Scollick* v. *Scollick*[3] and *Newson* v. *Newson*.[4]] If such a power exists, then an adopted child is far less remote than the children of a subsequent marriage.

It may be said on the basis of *Webster* v. *Webster and Williamson*[5] and *Tagart* v. *Tagart and White*,[6] in which no advantage to the issue of the marriage could result from the variation of the settlement and the court refused to vary, that the exercise of the power is in practice dependent upon some financial advantage accruing to the child of the marriage. In *Scollick* v. *Scollick*,[7] in which a variation was made, the child of the marriage did not benefit in this way from the variation—the only benefit which she could expect to receive was in the attitude of the wife's second husband. It is therefore submitted that if a benefit results to the child of the marriage from the variation of a settlement it matters not that the benefit is not financial or pecuniary so long as there is a personal benefit. In this respect reliance is placed on *Garforth-Bles* v. *Garforth-Bles*,[8] in which although, it is true, the variation resulted in financial benefit to the child, Pearce J. laid great emphasis[9] on the effect the variation would have in helping to assure a satisfactory personal relationship between the child and her father.

---

[1] See post, p. 82, n. 3.

[2] [1913] P. 211.

[3] [1927] P. 205.

[4] (1934) 50 T.L.R. 399.

[5] [1926] P. 198.

[6] (1934) 50 T.L.R. 399.

[7] [1927] P. 205.

It is submitted that the true effect of the authorities is that the court has power to make a variation of a settlement in favour of a person outside the marriage, provided that the variation also produces some quid pro quo for the child of the marriage either in the form of financial or personal advantages. In the present case the two boys have been brought up as brothers and it is important, in order to preserve that relationship, which is of great benefit to Anthony as the younger of the two, that parity should be preserved between them. It is submitted that this is a sufficient benefit to justify the variation sought.

Dennis Lloyd for the husband, and *Roger Ormrod* for the child Anthony, substantially adopting each other's arguments. The cases in which marriage settlements have been varied by giving a power to appoint to a person outside the marriage have always been distinguished by the fact that substantial financial benefits have accrued to the displaced child. In *Atkins* v. *Atkins and Urquhart*[10] the interest of the child was accelerated by the extinguishing of the wife's interest. In *Webster* v. *Webster and Williamson*[11] no foreseeable benefit was likely to result to the child and Hill J. refused to create a fresh power of appointment. In the later case of *Scollick* v. *Scollick*[12] he did so, pointing out that, in contrast to the situation in *Webster* v. *Webster and Williamson*,[13] where the child would have received no benefit, the child was to be provided with money for her education, etc., in place of a lump sum which might accrue to her at a much later date. The present case falls within the principle of *Webster* v. *Webster and Williamson*[13] and is distinguishable from *Scollick* v. *Scollick*.[14]

Settlements should not be interfered with on purely sentimental grounds. In *Newson* v. *Newson*[15] a new power of appointment was created in favour of persons outside the marriage, but substantial cash benefits were guaranteed to the existing child, while in the similar and almost contemporaneous case of *Tagart* v. *Tagart and White* [16] a variation of the settlement was refused on the ground that no advantages, other than conjectural ones, would result to the children of the dissolved marriage.

---

[8] [1951] P. 218; [1951] 1 T.L.R. 449; [1951] 1 All E.R. 308.

[9] [1951] P. 218, 222.

[10] [1913] P. 211.

[11] [1926] P. 198.

[12] [1927] P. 205.

[13] [1926] P. 198.

[14] [1927] P. 205.

[15] 50 T.L.R. 399.

The only case on which the wife here and Timothy can place any reliance is *Garforth-Bles* v. *Garforth-Bles*,[17] in which Pearce J. balanced the claim of the father to vary against the interest of the child with a view to maintaining an impartial and happy relationship between the two, but it is submitted that in that case also the child received a substantial benefit in the removal of the prior interest of both its parents, and Pearce J. so held. In the present case the only argument advanced for the variation sought is that it would put the two children on terms of parity. Even if this were a benefit which the court is entitled to take into account, which, it is submitted, it is not, then the court would have to be satisfied that it was of sufficient advantage to Anthony to warrant extinguishing his interest in half his capital sum and that such parity could not be achieved by any other means. It is, however, emphasized that the benefit which must accrue to a child in order to justify a variation of a marriage settlement must be a real and concrete benefit and not a possible emotional benefit.

Wright Q.C. replied.

Cur. adv. vult.

KARMINSKI J., reading his judgment, stated the facts substantially as set out above and, after directing that the agreed order for maintenance should be drawn up, continued: I wholly agree with the registrar's submission to dismiss the wife's application to extinguish the husband's rights, powers and interests in the settlement. The husband earns a substantial gross income and has also an income from certain family trust funds. Such capital as he has outside the settlement is effectively charged to his bankers in connexion with certain business undertakings. Mr. Wright did not press this part of his application, but pointed out that if the husband's rights were extinguished the interests of one (or of both) the infants would be accelerated. The position of the wife would not be improved, as she will, in any event, receive the income from her settlement during her life. Further, the funds of the settlement were wholly provided by the husband. It is a well-established principle that settlements ought not to be interfered with further than is necessary for the purposes of

[16] 50 T.L.R. 399.

[17] [1951] P. 218.

making proper provision for the injured spouse and the children of the marriage: *Prinsep* v. *Prinsep.*[1] In my view proper provision for both the wife and the children has already been made and no further provision is needed. Nor do I see any good reason for accelerating the interests of Anthony and postponing those of the husband. Both husband and wife are now 43 years of age, and there is no reason why one is the more likely to survive the other. If the wife survives the husband, any acceleration of Anthony's interests over those of the husband would be valueless. But having regard to all the circumstances of the parties as set out above, I do not think that the interests of Anthony need any acceleration. On the other hand, to postpone the interests of the husband would be to penalize him for his wrongdoing. To punish the wrongdoer is not the object of a variation of settlements: *Prinsep* v. *Prinsep.*[2]

There remains the third and most difficult part of this application, namely, that for providing that Timothy shall benefit under the settlement as though he was issue of the body of the husband and wife. Anthony and Timothy have been brought up to regard each other as brothers in every sense, and I have no doubt that in all respects they have been treated with complete equality by the parties and with equal affection. This part of the application proposed by Mr. Wright for the wife was, of course, warmly supported by Mr. Comyn for Timothy. It was equally warmly opposed by Mr. Ormrod for Anthony. Mr. Lloyd for the husband, while desiring equality between the children, appreciated the difficulties which might exist in law, and was unenthusiastically neutral.

The position of adopted children is now regulated by the Adoption Act, 1950. [His Lordship read section 13 (2) of the Act[3] and continued:] The registrar submitted that Timothy is

---

[1] [1930] P. 35, 47; 46 T.L.R. 29.

[2] [1929] P. 225, 236; 45 T.L.R. 376; [1930] P. 35, 47.

[3] Adoption Act, 1950, s. 10 (2): "In any case where two spouses are "the adopters, the spouses shall in "respect of the matters aforesaid, and "for the purpose of the jurisdiction "of any court to make orders as to "the custody and maintenance of and "right of access to children, stand "to each other and to the infant in "the same relation as they would have "stood if they had been the lawful "father and mother of the infant "and the infant shall stand to them "respectively in the same relation "as to a lawful father and mother "respectively."

S. 13 (2): "In any disposition of "real or personal property made, "whether by instrument inter vivos "or by will (including codicil), after "the date of an adoption order—(*a*) "any reference (whether express or "implied) to the child or children of "the adopter shall, unless the contrary "intention appears, be construed as, expressly excluded by the operation of that subsection from taking a benefit under the settlement, since the adoption order in respect of Timothy was made after (and not before) the execution of the settlement. I would myself prefer to say that Timothy is not included in the settlement by the provisions of section 13 (2) (*a*), a proposition at once accepted by Mr. Wright and Mr. Comyn. But Mr. Comyn rightly called my attention to section 10 (2) of the Adoption Act.[3] [His Lordship referred to the terms of section 10 (2) of the Act and continued:] He argued that this should form the background to section 13 (2). The "matters "aforesaid" in section 10 (2) refer to custody, maintenance and education of the adopted child and include the rights of consent or dissent to marriage. I accept that the general tenor of the Adoption Act, 1950, is to put adopted children as nearly as possible in the position of children of the marriage, especially where the adopters are husband and wife. But it remains clear that the Adoption Act, 1950, does not, by itself, bring into a will or settlement a child adopted after the execution of such will or settlement.

Both Mr. Wright and Mr. Comyn urged that the powers of the court created by section 25 of the Matrimonial Causes Act, 1950,[4] should be used to vary the settlement so as to bring a benefit to Timothy. By that section the court is empowered to make such order as it thinks fit; but it was conceded that the use of so wide a power must be made in the exercise of judicial discretion. It was not suggested that there was any financial quid pro quo for Anthony, unless his interest was accelerated. But for the reasons given above I do not think it right in this

---

"or as including, a reference to the "adopted person; (*b*) any reference "(whether express or implied) to the "child or children of the adopted "person's natural parents or either "of them shall, unless the contrary "intention appears, be construed as "not being, or as not including, a "reference to the adopted person; and "(*c*) any reference (whether express "or implied) to a person related to "the adopted person in any degree "shall, unless the contrary intention "appears, be construed as a reference "to the person who would be related "to him in that degree if he were the "child of the adopter born in lawful "wedlock and were not the child of "any other person."

[4] Matrimonial Causes Act, 1950, s. 25: "The court may after pronouncing a decree for divorce or for "nullity of marriage inquire into the "existence of ante-nuptial or post-"nuptial settlements made on the "parties whose marriage is the sub-"ject of the decree, and may make "such orders with reference to the "application of the whole or any part "of the property settled either for "the benefit of the children of the "marriage or of the parties to the "marriage, as the court thinks fit, "and the court may exercise the "powers conferred by this section "notwithstanding that there are no "children of the marriage."

1955

BEST
v.
BEST.

Karminski J.

case to postpone the husband's interest or to extinguish it. Mr. Ormrod argued that Anthony was being asked to give up the half of £9,000 without compensation. Mr. Wright and Mr. Comyn contended that the benefit for Anthony would be personal but not financial, and would preserve the true relationship with one whom he regards at present as an elder brother. Emphasis was laid on the need to preserve at least a feeling of equality between these two boys.

Mr. Comyn conceded that there would be great difficulties in his way but for a line of authorities decided under earlier statutes relating to variation, statutes which have now been re-enacted by section 25 of the Matrimonial Causes Act, 1950. These authorities have made it clear that the court can vary a settlement by creating a power enabling children of a future second marriage to share in the benefits of the settled fund if the existing child or children of a first marriage gain concurrent advantages.

Some examination of these authorities is necessary. In *Atkins* v. *Atkins and Urquhart* [5] Sir Samuel Evans P. confirmed a registrar's report extinguishing all the interests of the wife respondent in the settled funds and inserted a power enabling the husband, on any future marriage, to settle interests in three-fourths of the fund on any future wife and the children of any future marriage, but providing that the child of the existing marriage should never take a less share than he would have taken under a settlement declaring a trust in favour of all the children, not exceeding four, of the husband by any marriage in equal shares. In that case the President is not reported as having given any reasons for his judgment, but counsel for the infant child of the marriage expressed the view that the child of the marriage was put in a better position by the proposed variation than he was before. It will be noted that, in that case, the child of the marriage benefited by the extinction of the wife's interests. In 1926 Hill J. expressed doubts as to whether or not the court ought to create a new power not contemplated by the settlement, but stated that even if he had power he did not think that he ought on the facts of that case to exercise it: *Webster* v. *Webster and Williamson.* [6] In 1927 Hill J., in *Scollick* v. *Scollick,* [7] reconsidered the general principles and varied a settlement by creating a fresh power of appointment enabling the children of a future second marriage to share in the settled funds. Hill J. dealt with the general principles in the following terms [8]: "It must always be in the "interest of a child, if she has half-brothers and half-sisters, "that she should not be in some superior position in her expecta-"tions to them. I do not think that that is an important "consideration. But unless there is some pecuniary interest "I do not think I ought to interfere on that ground taken by "itself. Here it must be very much to the benefit of the child "that while she is growing up she should be secured with proper "maintenance and good education, even at the sacrifice of some "portion of a fund, which may in fact not actually come into her "possession for many years. That being so, I think it would be "pedantic to pay too close a consideration to the question whether "the original settlement contemplated a power of appointment "such as is now proposed to be introduced. The case is unlike "*Webster* v. *Webster and Williamson*,[9] because in that case, apart "from what has been spoken of as the sentimental side of the "question, the proposed alternative would have been all money "lost to the child. It was difficult to see any real quid pro quo "of any sort in that case." The earlier authorities were fully reviewed by Sir Boyd Merriman P. in *Newson* v. *Newson* [10] and *Tagart* v. *Tagart and White*.[11] In *Newson* v. *Newson* [12] the President introduced a new power of appointment for the benefit of an after-taken spouse and the issue of a future marriage, after being satisfied that the existing child would be compensated for any future loss by the guarantee of substantial advantages. In that case the interests of the child of the marriage were accelerated by the extinction of his father's interests in his mother's fund and of the mother's interests in his father's fund. In addition the father proposed to make an arrangement by which the child would take a substantial share of the income in his fund on falling into possession and the mother agreed to a like provision. Further, his grandmother was prepared to covenant to provide for maintenance and education. In *Tagart* v. *Tagart and White* [13] the President refused to insert in the settlement a clause giving power to the husband petitioner to appoint an interest to an after-taken wife or the children of such a future marriage on the ground that such a variation was not for the benefit or advantage of the children of the dissolved marriage.

---

[5] [1913] P. 211.

[6] [1926] P. 198.

[7] [1927] P. 205.

---

[8] [1927] P. 205, 209–10.

[9] [1926] P. 198.

[10] (1934) 50 T.L.R. 399.

[11] (1934) 50 T.L.R. 399.

[12] 50 T.L.R. 399.

[13] 50 T.L.R. 399.

Both Mr. Wright and Mr. Comyn relied on certain observations of Pearce J. in *Garforth-Bles* v. *Garforth-Bles.*[14] In that case the husband respondent had brought into settlement substantially all he possessed. There was one child of the marriage and, on the variation proceedings, the husband applied to extinguish the interests of the wife in his fund and the wife applied to extinguish the husband's interests in her fund. Both agreed on this variation, but the husband also asked to revoke the trusts of the settlement in respect of half his fund and to appoint that half or any part of it to an after-taken wife or to the issue of a future marriage. Pearce J. held[15] that the removal of both prior life interests in the fund was itself a substantial benefit to the child; he further held[16] that if the husband's application to revoke was refused the relationship between himself and the child might be strained and that such a strain might be more disadvantageous to the child than the retention of the whole of her interests. In the result Pearce J. made an order allowing the husband to remove two-fifths of the fund. Pearce J. was careful to point out[17] that although the child of the marriage would probably have been appointed by the respondent in any case to the whole of his fund she was assured by the variation that no part of the fund would be appointed to her children. It is true that Pearce J. laid more emphasis on the importance of the personal relationship between father and child than any of the earlier judgments to which I have been referred; but it is important to note that he emphasized also the material benefits which the child would receive under the variation.

Mr. Ormrod emphasized that in none of the reported authorities had the power to appoint to a future spouse or to the children of a subsequent marriage been given on sentimental or personal grounds alone. In all the authorities to which I was referred the variation was accompanied by a substantial monetary benefit to the child or children of the marriage. I can well understand the desire of the wife here to put these two boys on an equality in respect of financial matters, since to do so would at least remove any feeling of future inequality between them. But in my view, although I fully appreciate the importance of this argument, I feel myself unable to obtain equality of this kind at the price of so large a financial sacrifice on the part of Anthony. It may be that it will be possible for the husband to make some provision for Timothy by way of a policy of assurance, but that is a matter outside the questions before the court. I have come to the conclusion that that part of the report of the registrar submitting that the application of the wife to vary should be dismissed is correct.

---

[14] [1951] P. 218; [1951] 1 T.L.R. 449; [1951] 1 All E.R. 308.

[15] [1951] P. 218, 222.

[16] Ibid.

[17] Ibid.

1955

BEST
v.
BEST.

Karminski J.

Application dismissed.

Solicitors: *Baileys, Shaw & Gillett; Pontifex, Pitt & Co.; Official Solicitor.*

E. J.

FRANCIS *v.* FRANCIS AND DICKERSON.

1955
Dec. 2.

Sachs J.

Legal Aid — Costs — Taxation — Duty of solicitor incurring costs — Attitude to be adopted by taxing officer—Divorce—Inquiries as to adultery—No specific charge of adultery—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 1 (7) (*a*), 3*rd Sch.*

One of the fundamental principles upon which the legal aid system is based is that the assisted person, his solicitor and his counsel have the same freedom in the conduct of an assisted case, and are entitled to the benefit of the same relationships, as in a similar matter where the lay client is not an assisted person. The primary duty of a solicitor in conducting an assisted case is to his client; and the problem of incurring reasonable expense to attain justice is to be approached by solicitor and counsel in the same way as if the lay client were a person whose means enabled him to fight that particular case in a reasonable manner.

The correct viewpoint to be adopted by a taxing officer on a legal aid taxation, when considering whether or not an item in a bill of costs is "proper," is that of a sensible solicitor considering what, in the light of his then knowledge, is reasonable in the interests of his lay client.

Where a solicitor bona fide acting in what he considers the best interests of his client has incurred expenditure which will fall, unless allowed on legal aid taxation, on him personally, it would be wrong for the court to be astute in seeking reasons to disallow the items. As regards such honestly incurred expenditure the taxing officer on a "common fund" taxation should take a "liberal view."

It is the standard, and proper, view of taxing officers that as a general rule a solicitor acting on the advice of properly instructed counsel can hardly be said to be acting unreasonably.

The solicitors for a legally aided wife respondent were informed by their client that she had grounds to suspect the husband of adultery although he did not pray in his petition for the discretion of the court. They caused inquiries to be made accordingly, and took counsel's advice as to the desirability of continuing those inquiries, which ultimately led to a confession of adultery and an amendment to ask for discretion. On the solicitor and client taxation the registrar disallowed the expense in connexion with counsel's advice (including his fee) and of the inquiries, stating that it was the duty of solicitors to do all they properly could to protect the fund, that the wife's solicitors had failed to discharge that duty, and that they had gone beyond what was "absolutely "necessary" in the interests of their client. He further reduced the charge for instructions for brief (which included work in connexion with the inquiries as to adultery and correspondence) from 80 guineas to 20 guineas:—

Held, (1) that the registrar had erred in principle as to the primary duty of a solicitor conducting an assisted case, and as to what was proper in the client's interest, and had failed properly to take into account the fact that the solicitors had obtained counsel's advice.

(2) That the expenses of the inquiries had been reasonably incurred and should be allowed; even on the footing that the wife's certificate had been restricted to an authority to defend, where there were good grounds for suspecting a petitioner of adultery the respondent's solicitors would be doing less than their duty if they did not take reasonable steps to ascertain the true position.

(3) That although the figure of 20 guineas for instructions for brief was very much on the low side for such work as the registrar had considered permissible the quantum for that part of the work was not such as to justify review.

(4) That in respect of work and correspondence disallowed under the heading "instructions for brief" 25 guineas should be allowed in addition to the above 20 guineas.

(5) That the items in relation to the instructions to and advice by counsel should be allowed.

Per curiam: It is essential that legal aid certificates should be clear so as to enable all concerned to understand exactly what they mean.

SUMMONS to review taxation of assisted person's solicitor and client costs in defended divorce suit (adjourned into court for judgment).

The husband by his petition of March 24, 1953, alleged adultery by his wife from February, 1940, onwards. The wife by her answer of July 15, 1953, admitted the adultery charges but alleged that it had been conduced to by the husband's conduct. She further alleged that the same conduct constituted constructive desertion by the husband in 1938 and accordingly in her turn asked the court in its discretion for a decree. It was common ground that in 1938 the wife had obtained from the justices an order against the husband on the ground of his neglect to maintain her and her child. Whilst the wife asked for the discretion of the court to be exercised in her favour and filed a discretion statement accordingly, the husband made no such request and filed no such statement.

Upon the wife informing her solicitors that she had grounds to suspect the husband of adultery, they caused inquiries to be made. In July, 1954, the solicitors, being doubtful as to whether these inquiries were justifying themselves, put the matter before counsel. The advice they received was to the effect that whilst there was a certain consistency in the material thus far gathered, there was nothing as yet in that material which would justify an amendment at that stage of the pleadings: it was also advised that certain further inquiries could reasonably be made. The solicitors thereupon continued in their previous course, still without success, but whilst dealing with a quite different matter at the beginning of November, 1954, they chanced upon vital information and on November 6, 1954, two days before trial, an inquiry agent obtained a written confession from the woman concerned.

On November 8, 1954, the case appeared in the list before Donovan J., who in all the circumstances refused the wife leave to amend her answer, but granted the husband leave to amend his petition by asking for the discretion of the court. Thereupon the husband filed a discretion statement admitting adultery from June, 1953, onwards. The result of the trial was that both parties obtained decrees—the husband being told plainly that he was fortunate in the circumstances to have discretion exercised in his favour.

The wife and co-respondent (whose costs were not in issue on this application) were assisted persons from the start; the husband was granted a civil aid certificate after the proceedings had begun. No order was made at the hearing for costs inter partes.

When the matter of the taxation of the costs of the wife came before the district registrar at Lincoln on a solicitor and client taxation under the provision of the Legal Aid and Advice Act, 1949, certain items in the bill were disallowed and others reduced. Objections were lodged in respect of more than 20 items and the objections were pursued in respect of the following:—

"In view of fresh developments further instructions to "counsel to advise on evidence (charge £1); Attending counsel "therewith (charge 6s. 8d.); Paid his fee and clerk (charge "£2 4s. 6d.);

"Instructions for brief including numerous attendances on "respondent, co-respondent and Mrs. J. [the wife's mother]. "Instructing agents at Spalding and Leicester to make inquiries, "correspondence with them and perusing their reports. Such "reports being unsatisfactory, attending at Spalding and Gosberton with respondent, interviewing numerous possible "witnesses, ascertaining that petitioner visited Leicester every "other weekend where he stayed with a woman but being "unable to find the address. Subsequently telephoning to "Spalding. Further instructions to agents at Leicester and "arranging with respondent to assist in trying to trace petitioner at Leicester. Correspondence with Mr. W. Glenn "endeavouring to obtain record of parties' tenancy. Correspondence with Lincoln Constabulary and clerks to the "magistrates at Northampton, Louth and Spalding obtaining "particulars of earlier proceedings and payments of affiliation "and maintenance, and orders issued for failure to pay. Attending at Leicester with inquiry agent making door-to-door inquiries "in Filbert Street, interviewing Mrs. Lily C. and obtaining "statement that she had committed adultery with the petitioner. "Generally preparing the cause for trial (charge £84);

"Paid travelling etc. to Spalding (charge £5); travelling etc. "to Leicester (charge £2); agents' fees, Govan Watson, Andrew "Race (charge £5 3s. 6d.); Hill & Mason (charge £4 3s. 11d.); "Owston & Co. (charge £18 18s.)."

The following grounds for objection in respect of the taxing down of those items were given: "That the learned registrar "has misdirected himself as to the effect of the respondent's "civil aid certificate. That such certificate entitled the respondent (1) to defend the petition and (2) to claim relief by a "cross-prayer on any grounds available to her. That all work "done and inquiries made were proper and necessary for the "preparation of the respondent's case and for ensuring the full "facts were before the court and the whole of such work was "within the authority given by the civil aid certificate. That "the item 'instructions for brief' is fair and reasonable having "regard to the complexity of the matter, the time spent thereon, "the difficulty in obtaining evidence and the work involved."

The district registrar disallowed, inter alia, the items for the instructions to and advice of counsel, reduced the fee for instructions of brief (which included all items set out above under that heading) from 80 guineas to 20 guineas, and disallowed all the disbursements to inquiry agents except for one item taxed at three guineas. (No question arose on this summons concerning other disallowed items.)

The legal aid certificate granted to the wife was expressed to be "to defend proceedings for divorce brought by [the husband] "including a prayer for relief, if necessary."

The district registrar, in his observations upon the objections in question, said: "I did not misdirect myself. As a result of "information I received from legal aid headquarters that the "respondent had not applied to cross-petition and that the civil "aid certificate did not authorize her to do so, I taxed the bill "on the footing that she simply had authority to defend.

"Her solicitors sought the opinion of counsel upon the result "of the taxation, which opinion was produced to the area "secretary, who decided that the respondent must be deemed to "have had authority to cross-pray, although he maintained that "the wording of the certificate was most unusual, the usual "form being '(1) to defend; (2) to cross-pray; (3) to enforce.' "I am still, however, at a loss to know what is meant by the "words 'if necessary' following the wording 'including a prayer "'for relief' in the certificate.

"The answer, which was settled by counsel, was filed in "July, 1953, respondent alleging that the petitioner had conduced "to her adultery, and cross-prayed for relief on the ground of "desertion in 1938, which appeared to be all that was necessary "to entitle her to relief, as it proved to be. Notwithstanding "that, respondent's solicitor launched a number of inquiries into "the petitioner's conduct, as a result of a rumour that he was "associating with a woman in Leicester."

[The district registrar referred to inquiries made in Gosberton in Lincolnshire where the petitioner lived, in Leicester which it was thought the petitioner was visiting, and referred also to two occasions when attempts were made to follow the petitioner to Leicester. The registrar continued:] "The 1954 inquiries were "set in motion after the cause had been set down for trial, which "was on April 6, 1954, when the pleadings were of course closed, "there being no allegation of adultery against the petitioner, "and I cannot see what justification there was for continuing "the inquiries.

"To quote a former senior registrar, it is the duty of solicitors "'to do all they properly can to protect the fund and thereby "'the interests of the taxpayer,' a duty which respondent's "solicitors have failed to discharge. They have also gone beyond "what was absolutely necessary in the interests of their client.

"I do not agree that there was any complexity about the "case. Respondent's solicitors have exaggerated the so-called "difficulties. . . . In the circumstances I consider £84 for the "item 'instructions for brief' exorbitant. Having regard to my "observations, the proper allowance is 20 guineas, and a sum of "£3 3s. as a disbursement, which is an adequate sum to allow, "had a Spalding inquiry agent been employed in 1953, as might "have been done, instead of engaging one from Lincoln."

Trevor Guest (who did not appear at the hearing of the suit) for the applicant.

Argument was in chambers.

Cur. adv. vult.

SACHS J., reading his judgment, said that he had been asked to adjourn his judgment into court as it raised points of general importance as regards solicitors acting in legal aid matters. [His Lordship stated the history of the proceedings leading up to the decrees substantially as set out above, and after referring to the nature of the taxation continued:] The observations of the district registrar, and this application, relate solely to a legal aid taxation, there having been no party and party taxation.

At this point I wish to express my appreciation for the detailed and helpful way in which the district registrar's observations were put forward. It is always of high importance where an objection has been lodged that the registrar should, in compliance with the duty cast upon him by R.S.C., Ord. 65, r. 27 (40), set out fully, in relation to the objection, the grounds upon which he disallows the whole or part of any expense. It is only when he does thus comply with this duty that the court can perform its proper function upon a review, viz., that of checking whether amongst the factors which he took into account he has or has not acted in some degree on an erroneous principle.

In the present case, too, it is to be noted that whereas objections were lodged in respect of more than 20 items, only a few of them have been pursued in this application. The clear way in which the registrar dealt with the other objections was obviously a contributory cause to their being abandoned later.

As regards the items remaining in dispute he gave amongst his reasons several to which it is necessary to advert. The first of these relates to a doubt in his mind as to whether the form of certificate entitled the wife to the benefit of the provisions of the Legal Aid and Advice Act, 1949, in respect of her cross-prayer.

He states: "I taxed the bill on the footing that she simply had "authority to defend." But even if that were the true construction of the certificate, it cannot properly be said that the inquiries made by the agents as to the husband's adultery were not covered by the certificate. Whenever a petitioner does not ask for discretion to be exercised in his favour it is obvious that the decision of the court is likely to be affected by proof that he has committed adultery. It being the duty of the court to act in accordance with the justice of the case, the moment it appears that the petitioner has failed to make proper disclosure to the court he stands at risk of the decree being refused.

It follows that where there are good grounds for suspecting such a petitioner of having committed adultery, the respondent's solicitor would be doing less than his duty in defence of his client's rights if he did not take reasonable steps to ascertain what was the true position and so enable his client either to seek to raise the issue in court, or, at least, to put the court in the position where the intervention of the Queen's Proctor could be sought.

I now turn to the form of certificate, which was "to defend "proceedings for divorce brought by John Robert Francis in- "cluding a prayer for relief, if necessary." Where the court has before it a certificate which does not seem clear, it has to interpret it as a matter of legal construction. Here the registrar fell into the error of asking the area committee for an interpretation. In fact he has received two contradictory opinions from the same area committee—the earlier that the certificate only covered a defence, the later that it covered proceedings by way of cross-prayer: he has adopted the earlier opinion and here, again, I am unable to agree with him. The words "including "a prayer for relief" have no sense unless they entitle the respondent to raise allegations which would and do result in a cross-prayer. I hope, however, that no further certificate will be issued in this unfortunate form: it is of course essential that legal aid certificates should be clear so as to enable all concerned to understand exactly what they mean.

I next turn to a passage in the observations of the district registrar that requires particular attention. He states: "To "quote a former senior registrar it is the duty of solicitors 'to "'do all they properly can to protect the fund and thereby the "'interests of the taxpayer,' a duty which respondent's solicitors "have failed to discharge. They have also gone beyond what "was absolutely necessary in the interests of their client."

That paragraph, apparently derived from some source regarded as authoritative by the district registrar, combines within itself two fallacies and so discloses an erroneous approach to the particular matters under consideration—and to legal aid taxations in general.

First, the primary duty—and so long as the case is conducted reasonably within the ambit of the legal aid certificate, the only duty—of a solicitor in conducting an assisted case is to his client. Not only is that the general intent of the Legal Aid and Advice Act, 1949, but section 1 (7) (*a*)[1] specifically states that—saving only certain express exceptions—the solicitor's "relationship "with" (which naturally includes "his duties to") his client remain unaffected by the fact that the client is an assisted person. Indeed, one of the fundamental principles upon which the legal aid system is based is that the assisted person, his solicitor and his counsel, have the same freedom in the conduct of an assisted case, and are entitled to the benefit of the same relationships, as in a similar matter where the lay client is not an assisted person. Solicitor and counsel have thus to approach the consideration of any problem as to incurring reasonable expense to attain justice in an assisted case in the same way as if the lay client were a person whose means enabled him to fight that particular case in a reasonable manner.

The limitations to a solicitor's ability to act freely in accordance with this general rule are express, are laid down in the Act itself, and have no application to the present case. In so far as they limit freedom in the conduct of proceedings they are mostly to be found in regulation 14 of the Legal Aid (General) Regulations, 1950, which deals, inter alia, with the leave necessary to appeal in interlocutory matters, the briefing of leaders and so forth.

In referring to the conduct of an assisted case I have, of course, only been concerned with steps taken during the currency of a legal aid certificate to assert or dispute a right: and nothing I have said relates to the quite separate problem—one with which the taxing officer is not concerned—as to the point at which it may become unreasonable to continue the proceedings at all (cf. regulation 14 (7) and (13)).

The second fallacy inherent in the above cited observation lies in the phrase containing the words "absolutely necessary." Such a phrase has certainly no place on "a taxation as between "solicitor and client where the costs are to be paid out of a "common fund in which the client and others are interested" —as appears from the tenor of the observations of Buckley L.J. in *Giles* v. *Randall.*[2] Nor would it have made matters better if the word "absolutely" had been omitted. The words in R.S.C., Ord. 65, r. 27 (29) are "necessary or proper": and "proper" has always been construed as "reasonably incurred" (cf. *per* Atkin L.J. in *Société Anonyme Pêcheries Ostendaises* v. *Merchants' Marine Insurance Co.*[3]). Indeed, "reasonable," "proper" and "reasonable and proper" (cf. R.S.C., Ord. 65, r. 27 (38) and *per* Singleton L.J. in *Lyon* v. *Lyon*[4]) are obviously interchangeable expressions in the context under consideration—and all include something beyond what is meant by "necessary" in the sense it appears to be used in the above observation of the district registrar.

---

[1] Legal Aid and Advice Act, 1949, s. 1 (7): "Save as expressly provided "by this Part of this Act or by regula- "tions made thereunder,—(*a*) the "fact that the services of counsel or "a solicitor are given by way of legal "aid shall not affect the relationship "between or rights of counsel, solicitor "and client or any privilege arising "out of such relationship."

When considering whether or not an item in a bill of costs is "proper" the correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay client. That is, of course, a very different angle to that called to mind by the registrar's observation; it is wrong for a taxing officer to adopt an attitude akin to a revenue official called upon to apply rigorously one of those Income Tax Act Rules as to expenses which have been judicially described as "jealously restricted" and "notoriously rigid and "narrow in their operation." I should add that, as previously indicated, the lay client in question should be deemed a man of means adequate to bear the expense of the litigation out of his own pocket—and by "adequate" I mean neither "barely "adequate" nor "super-abundant."

It may save misapprehension, too, if one remembers that neither in an unassisted nor in an assisted case has a solicitor any implied authority to take steps which are extravagant or over-cautious: but a vital distinction between an unassisted case and an assisted case is that in the latter there is no one who can even give an express authority to the solicitor enabling him to charge for such steps. That leads, of course, to an essential difference between taxations of the type now under consideration

---

[2] [1915] 1 K.B. 290, 295.

[3] [1928] 1 K.B. 750, 762; 44 T.L.R. 270.

[4] [1953] P. 1, 8; [1952] 2 T.L.R. 775; [1952] 2 All E.R. 831.

1955

FRANCIS
v.
FRANCIS
AND
DICKERSON.

Sachs J.

and a " solicitor and own client " taxation; but to express that difference either in the words imputed to a former registrar or by the reference to what is " absolutely necessary " can be definitely misleading.

The next sentence in the observations which needs consideration is that in so far as the 1954 inquiries were continued upon counsel's advice they took place after the cause had been set down for trial, " when the pleadings were of course closed, there " being no allegation of adultery against the petitioner, and I " cannot see what justification there was for continuing the " inquiries." My earlier remarks on the duty of the court to act according to the justice of the case indicate the fallacy underlying the above observation. Indeed, it has before now happened in a divorce suit that the whole course of the proceedings has been changed by last moment discoveries which led to amendment of the pleadings just before or even at trial.

Further, the fact that the solicitor had at this stage obtained counsel's advice does not seem to have been taken into account: it is the standard—and proper—view of taxing officers that as a general rule a solicitor acting on the advice of properly instructed counsel can hardly be said to be acting unreasonably —save perhaps in some very exceptional set of circumstances.

There being, accordingly, points on which the registrar was in error in principle, I return to the actual items disallowed or reduced.

First as to the inquiry agent's fees and the other expenses connected with inquiries about the husband's adultery.

Where a solicitor bona fide acting in what he considers the best interests of his client has incurred expenditure which, unless allowed on legal aid taxation, will fall on him personally, it would be wrong for the court to be astute in seeking reasons to disallow the items, and in particular care must be taken not to be affected by what is colloquially termed " hindsight." Indeed, there is authority for saying that as regards such honestly incurred expenditure (assuming there is nothing that can fairly be termed unwarrantable or excessive about it) the taxing officer on a " common fund " taxation should take a " liberal " view " (*per* Horridge J.—*In re Lavey*[5]). In no matter is this more important than when dealing with expenditure upon inquiries—for otherwise there might creep in a tendency towards " payments by results," which would be contrary to the best interests of justice.

---

[5] [1921] 1 K.B. 344, 354.

1955

FRANCIS
v.
FRANCIS
AND
DICKERSON.

Sachs J.

I have, of course, examined carefully the detailed remarks of the district registrar on specific items of expenditure on the inquiries. These were affected by his having approached the matter on a wrong principle. Suffice it accordingly to say that, examining each item de novo, I find myself unable to agree with the individual criticisms any more than I agreed with the general approach of the taxing officer. I do not think it would in all the circumstances serve a useful purpose to refer to each individual criticism as no further question of principle arises on them.

In the result I have come to the conclusion that these expenses should be allowed as having plainly been reasonably incurred. I would have so held even if they had not eventually resulted in a confession: for on a solicitor and client taxation under the Third Schedule of the Legal Aid and Advice Act, 1949, such costs may well be reasonably incurred even if the inquiries prove fruitless—and I agree with the observations on that point of His Honour Judge Richardson as reported in *Lyon* v. *Lyon*.[6]

Secondly, it seems to me that the district registrar should have allowed the work done in relation to the bulk of the other correspondence which he disallowed acting on the same error in principle.

Thirdly, I allow the items in relation to the instructions to and advice by counsel. It is to the solicitor's credit and not—as the district registrar thought—the reverse that he sought counsel's advice at the point he did. (I may add, too, that the district registrar seems to have misread the details of the instructions to counsel—as he refers to a passage which I cannot find.) Here the fact that a common fund taxation is on a more generous scale than a party and party taxation is particularly relevant.

Fourthly, there is the item of instructions for brief, etc. Clearly there must be an addition to this item in respect of work relating to the issue of adultery on the part of the husband and to the considerable correspondence on other points disallowed in error. But before I reach that question, the point arises as to whether or not this is a case in which the fee of 20 guineas can be successfully attacked as being inadequate even for such work as the registrar regarded as proper for the particular case.

Where a sum for instructions for brief, etc., is fixed within the legitimately exercised discretion of a taxing officer, it cannot of course be challenged on quantum at a review by a judge. But if the figure allotted by the registrar is either above or below that "generous ambit within which reasonable disagreement is "possible" (to use the words of Asquith L.J. on a different discretionary matter in *Bellenden, formerly Satterthwaite* v. *Satterthwaite*[7]) then the mere fact that it comes outside that ambit may of itself provide good cause for a successful challenge by an aggrieved solicitor, for "the very sum allowed may in "exceptional circumstances show that some wrong principle "has been followed" (*per* Swinfen-Eady L.J. in *Slingsby* v. *Attorney-General*,[8] and see *White* v. *Altrincham Urban Council*[9]).

---

[6] [1953] P. 1, 3.

From my own knowledge of other bills in relatively short defended divorce causes, it was clear that the figure of 20 guineas was very much on the low side. In those circumstances it seemed right to make further inquiries from two available sources, and I would like to express my gratitude to both for the great deal of trouble they expended on this matter. The Law Society were good enough to make an analysis, from amongst the several hundred bills passing in any one week through their accounting department, of a considerable number relating to the shorter defended divorce causes as taxed all over the country: but in the event that analysis did not of itself provide a conclusive answer to this particular case. I also sought the benefit of the detailed views of the two senior registrars of this Division on this particular case. The result is that in my opinion the figure of 20 guineas for that particular portion of the work must stand—as it is not established that it comes outside the legitimate bracket of permissible figures. It is, in my view, the lowest permissible figure at which it could have been taxed, and one would normally expect something quite distinctly more—but on the authorities this does not warrant any interference with the quantum decided upon by the district registrar. On the other hand, when making an addition for the work which should not have been disallowed (which was in volume but little less than that for which the 20 guineas was assessed), I can properly proceed on a more normal basis and I propose to allow an additional 25 guineas. Therefore the total for this item is increased to 45 guineas. I would add that I do not consider that any registrar would have allowed this item at a figure quite as high as that at which it was originally put into the bill by the solicitors: but equally I do not consider fair the language of condemnation applied by the registrar to that figure.

---

[7] [1948] 1 All E.R. 343.

[8] [1918] P. 236, 239; 31 T.L.R. 246.

[9] [1936] 2 K.B. 138, 144; 52 T.L.R. 441; [1936] 1 All E.R. 923.

The result is that upon this application to review I make the adjustments above stated and order that there be a taxation on a legal aid basis of the costs of the present application with a certificate for counsel.

The contribution of the parties towards their legal aid is of so low a nature that no risk arises in this particular case of the costs of this application falling upon them, and so I need make no recommendation to the Law Society in that respect.

Application allowed.

Solicitors: *Theodore Goddard & Co. for Browne & Wells, Northampton.*

J. B. G.

FRIBANCE *v.* FRIBANCE.

1955
Nov. 30.

Barnard J.

Husband and Wife—Property—Proceedings under Married Women's Property Act, 1882, *s.* 17*—Jurisdiction—Summons in respect of property issued—Decree absolute before hearing—Jurisdiction of court notwithstanding—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

A wife, who had been granted a decree nisi of divorce, issued a summons under section 17 of the Married Women's Property Act, 1882; but the decree was made absolute before the summons could be heard or any preliminary order made:—

Held, that as the parties were husband and wife when the summons was issued, the court had jurisdiction to dispose of the matter notwithstanding the fact that that relationship had ceased.

Hichens v. *Hichens* [1945] P. 23; 61 T.L.R. 302; [1945] 1 All E.R. 451 applied.

SUMMONS (adjourned into court for judgment).

The following statement of facts is taken from the judgment.

On May 10, 1955, the wife obtained a decree nisi of divorce on the ground of her husband's cruelty. On September 8, 1955, the wife issued a summons under section 17 of the Married Women's Property Act, 1882, claiming that (a) her husband held in trust for himself and herself certain leasehold premises,

1955

FRIBANCE
v.
FRIBANCE.

and that (b) certain specified furniture was her sole property or, alternatively, the joint property of her husband and herself; that summons was returnable for October 3, 1955. On the same day as the wife issued her summons she filed an affidavit in support thereof, and on September 30, 1955, the husband filed his affidavit in reply. The husband also filed an affidavit on September 30, 1955, in support of a summons he had taken out on September 22, 1955, to show cause why the decree nisi should not be made absolute. On October 3, 1955, owing to the illness of the registrar, the wife's summons was postponed from that date to October 17, 1955. On October 4, 1955, the husband's summons came before the senior registrar and he ordered that the decree nisi be made absolute. When the wife's summons came on for hearing on October 17, 1955, the registrar referred the matter to the judge because the parties were no longer husband and wife by reason of the decree absolute of divorce.

H. S. Ruttle and *Ian Kennedy* for the wife.
Dimitry Tolstoy for the husband.

Cur. adv. vult.

BARNARD J. read the following judgment: The question before me is whether or not the court has jurisdiction to hear and determine a summons under section 17 of the Married Women's Property Act, 1882, issued when the parties were husband and wife, but who have ceased to be husband and wife. [His Lordship stated the facts, and continued:] Mr. Ruttle, on behalf of the wife, argued that, provided the parties were husband and wife when the summons was issued, then the court had jurisdiction to hear and determine the matter in dispute, notwithstanding the fact that at some time after the issue of the summons they ceased to be husband and wife, and referred me to *Hichens* v. *Hichens*[1] as an authority for his proposition. Mr. Tolstoy, on behalf of the husband, contended that the court only had jurisdiction provided that there was an order directing an inquiry. He also relied on *Hichens* v. *Hichens*[1]; and Rayden on Divorce (6th ed., p. 326, para. 21) supports this view of *Hichens* v. *Hichens*.[1] He further stressed the point that, assuming that the court had no jurisdiction, the wife still had her remedy at common law.

Lord Goddard, in the course of his judgment in *Hichens* v. *Hichens* in the Court of Appeal, says[2]: "It seems to me that

---

[1] [1945] P. 23; 61 T.L.R. 302; [1945] 1 All E.R. 451.

[2] [1945] P. 23, 25.

"the answer to the problem is this. If the parties are husband "and wife when the question arises, either can apply to the "court, and the court can, if it sees fit, order an inquiry," and also[3]: "If at the time when they apply the parties are husband "and wife, as they were in this case, then the court has power "under the section either to make an order at once or to direct "an inquiry. If it directs an inquiry, I do not see that there is "anything which forces us to say that that inquiry must come "to a standstill if a decree absolute intervenes. The inquiry is "on foot, it can be carried out." Lord Goddard also said[4]: "On the other hand, as the court had jurisdiction to act under "the section when the application was made, it must have "power to carry the matter to a conclusion. That seems to have "been the view of Denning J., and I think it is the right view. "The court had power, on the husband's application while the "marriage still subsisted, to direct this inquiry."

It must be borne in mind that when *Hichens* v. *Hichens*[5] was decided the practice was to take out a summons before the judge, who almost invariably made an order referring the matter to one of the registrars to inquire and report, although, of course, the judge could, if he thought fit, make an order then and there with respect to the property in dispute; but now, by virtue of the Matrimonial Causes Rules, 1950, r. 75, the summons is taken out before a registrar, who may exercise all the jurisdiction and powers conferred upon a judge by section 17 of the Married Women's Property Act, 1882. Thus a registrar could then and there make an order with respect to the property in dispute, or he could adjourn the summons and fix a date for the parties to attend before him to be cross-examined, or he could order discovery to be given. Assuming that Mr. Tolstoy's argument was correct, and applying that argument to the new practice, the jurisdiction of the court to hear and determine the summons under section 17 might depend solely on whether or not the registrar had made some preliminary order on the summons such as an order for discovery. I cannot believe that this is the law, nor do I believe that Lord Goddard intended any such construction to be put upon his judgment. I have come to the conclusion that where Lord Goddard refers to the judge directing an inquiry, he is only stating the facts in that particular case, and that the ratio decidendi of his judgment is to be found where he states[6] that "as the court had jurisdiction to act under the

---

[3] [1945] P. 23, 25.

[4] Ibid. 26.

[5] [1945] P. 23.

[6] Ibid. 23, 26.

1955

FRIBANCE *v.* FRIBANCE.

Barnard J.

"section when the application was made, it must have power "to carry the matter to a conclusion."

Provided that the parties were husband and wife when the summons was issued, then I think that the court has jurisdiction to dispose of the matter, notwithstanding the fact that at any time thereafter that relationship ceased. I, therefore, refer this summons back to the registrar to be heard and determined.

Order accordingly.

Solicitors: *Edwin Coe & Calder Woods; Hillearys.*

J. B. G.

C. A.

1955 *Nov.* 16, 17.

Denning, Hodson and Morris L.JJ.

HARVEY *v.* HARVEY.

Husband and Wife—Justices—Desertion—Termination—Removal of basis by agreement—Constructive desertion—Wife leaves home because of husband's refusal to turn out unsatisfactory son—Agreement by husband to turn son out and wife to return home—Desertion terminated by agreement.

A wife left the matrimonial home in November, 1954, because her husband would not agree to turn out of the home their married son whose behaviour had become intolerable to his mother. She issued a summons against her husband for maintenance on the grounds of his desertion; but at the hearing she agreed to return home on an undertaking that the son would leave. The son left and the wife returned, but left four days later, and restored her original summons, alleging that her husband had been continuously in desertion since the previous November:—

Held, that, even if the husband's original refusal to get rid of the son had constituted constructive desertion because it had driven his wife from the matrimonial home, that desertion had ended on the wife's return.

Per Hodson L.J. The desertion was terminated when its basis had been removed by agreement.

Observations of Hodson L.J. in *Perry* v. *Perry* [1952] P. 203, 232; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076 applied.

Decision of Divisional Court affirmed.

APPEAL by leave from the Divisional Court (Lord Merriman P. and Davies J.).

The parties, who were married in 1928, took into the matrimonial home a married son, whose wife had left him, and the son's small children. The son's behaviour to his mother and generally was such that she told her husband that if the son was not made to leave the home she would go. The husband demurred, saying that he could not turn out their own flesh and blood. Accordingly, on November 15, 1954, the wife left the home and issued a summons against her husband alleging desertion and wilful neglect to maintain her. Her solicitors wrote to the husband saying that his wife would be prepared to return to the home if the son left it. The husband in turn alleged that his wife had deserted him.

The hearing of the summons before the justices at Cardiff, on December 21, 1954, was adjourned on undertakings being given by the son to leave the home and go into lodgings, by the wife to return home, rejoin her husband, and look after the grandchildren, and by the husband to provide maintenance for his wife. The son left the home and the wife returned on February 27, 1955; but she left again on March 4, and restored her original summons. That was heard by the justices on March 30, 1955, when they made an order for maintenance in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. In their reasons for their decision the justices said that the original refusal of the husband to take any action in regard to the son had driven his wife from the matrimonial home in November, 1954; that his behaviour on her return in February (on which they accepted the wife's evidence in preference to that of the husband) was such as to reduce her status to something less than might have been expected by a housekeeper; that the husband had not been genuine in inviting her to return; and that there had been no resumption of cohabitation. Accordingly, they held that the original desertion in November had continued throughout the period in question and had not been broken by her four-day return from February 27 to March 4.

The husband appealed to the Divisional Court which, on May 12, 1955, allowed his appeal. The court expressed the view that if the magistrates at the hearing in December, 1954, had adopted the usual procedure of making an interim order for an appropriate amount and had adjourned the case on the basis that nothing had been determined, the matter would have been easier, for if the case had then come before them again it could have been disposed of in a much simpler way than was now the position. They also criticized the procedure by which the wife had restored the original summons instead of taking out a fresh summons based on the events of which she complained after she returned

C. A.
1955

HARVEY
v.
HARVEY.

on February 27, or obtaining leave at the hearing to add that as an additional ground of complaint. Allowing the appeal, and expressing the view that the justices' finding of continuous desertion throughout the period from November to March was artificial, the court quashed the orders of the justices and ordered that the matter be sent back for rehearing to another bench of justices.

The wife gave notice of appeal from that order, and on July 25, 1955, the Divisional Court granted her leave to appeal out of time.

F. Elwyn Jones Q.C. and *John K. Wood* for the wife. The justices were correct in finding that the husband, by refusing to turn out the son, knowing that the son's behaviour had become intolerable to his wife, was guilty of constructive desertion, for his conduct drove his wife from the home.

[DENNING L.J. If the husband was faced with an almost impossible choice between son and wife, and chose wrongly, is he therefore to be accused of deserting his wife?]

A husband's first duty is to his wife; and the justices have found that there was original constructive desertion. On the assumption that there was such desertion up to the time when the wife first left the home, the second question is whether or not, when the wife returned home after the son had left, there was such resumption of cohabitation as to bring that desertion to an end. The justices have found that the desertion continued, for the husband was not genuine in his invitation to her to return, and when she returned he treated her as something less than a housekeeper, merely someone to look after the grandchildren. To constitute resumption of cohabitation two elements are necessary: (*a*) resumption of cohabitation in fact and (*b*) a bilateral intention on the part of both spouses to resume cohabitation, as Lord Merriman P. said in *Mummery* v. *Mummery*.[1] The essence of that decision was that resumption of cohabitation sufficient to defeat a previously existing state of desertion must mean true reconciliation, such as was considered in *Mackrell* v. *Mackrell*,[2] where Denning L.J., citing Lord Chelmsford L.C., said[3] that "'the forgiveness which is to take away the husband's right to "'a divorce must not fall short of reconciliation.'" The husband must take back his wife as a wife: see *Slawson* v. *Slawson*,[4] *per*

---

[1] [1942] P. 107, 110; 58 T.L.R. 203; [1942] 1 All E.R. 553.

[2] [1948] 2 All E.R. 858.

[3] Ibid. 860.

[4] [1942] 2 All E.R. 527; 167 L.T. 260.

Bucknill L.J.,[5] that if the offer of a spouse to come back was something less than an honest proposal to come back and lead the ordinary married life of husband and wife, it was not an offer which terminated the desertion.

[Hodson L.J. That was a case of imposing terms; the husband in the present case did not impose any terms.]

In *Wily* v. *Wily*[6] Hill J. said that willingness to live under the same roof was not per se sufficient; the wife must be treated as a wife.[7] And in *Bartram* v. *Bartram*[8] Denning L.J. said[9] that once a period of desertion had begun to run, it did not cease to run because the parties attempted a reconciliation and for that purpose came together again for a time under the same roof. [*Perry* v. *Perry*[10] was also referred to.]

[Denning L.J. In the present case the wife said that she would come back if the son left the house. The husband arranged for that to be done, and she returned. Why does not that coming together terminate the desertion?]

Because there is no evidence that the husband intended or hoped to effect a true reconciliation or to resume a matrimonial home. The effort to resume cohabitation was one-sided. The wife gave up a job and returned home to do her duty as a wife, and she was met with a campaign of silence for three days, broken on the fourth day by some ill-tempered observations by the husband about money, and culminating in an assault.

[Hodson L.J. He was trying to keep her, even though it was a rough way of doing it.]

The facts found by the justices here constituted in law a failure to establish resumption of cohabitation, and the original state of constructive desertion was accordingly not terminated. The findings of the justices should not be disturbed, and the principle laid down by Hodson L.J. in *Lane* v. *Lane*[11] should be followed, namely, that where the evidence is capable of amounting to evidence of desertion the court is very reluctant to interfere with the findings of justices.

J. T. Molony Q.C. and *A. S. Myerson* for the husband. The question whether there has been constructive desertion requires to be proved by evidence of great cogency, and the Divisional Court was right in saying that the justices did not appear to have applied the law correctly on that question and in particular ignored the fact that the husband had a most difficult choice imposed on him and ought not to be penalized for having preferred one member of his household to another.

---

[5] [1942] 2 All E.R. 527, 528.

[6] [1918] P. 1.

[7] Ibid. 3.

[8] [1950] P. 1; 65 T.L.R. 492; [1949] 2 All E.R. 270.

[9] [1950] P. 1, 6–7.

[10] [1952] P. 203; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076.

[11] [1952] P. 34; [1952] 1 T.L.R. 250; [1952] 1 All E.R. 223n.

But even if the wife was originally entitled to complain of the presence of her own son in the matrimonial home, it is submitted that an agreement was reached by which she would return home if the son left; that bargain was implemented by the husband; and, therefore, as soon as the wife returned home and her husband opened the door to her and carried her case in, the parties resumed cohabitation and the original desertion was terminated.

[MORRIS L.J. The justices found that the husband did not really want her to come back. His treatment of her after her return was hardly resumption of cohabitation as it was considered in *Bartram* v. *Bartram.*[12]]

That depends on what had been enjoyed or endured by the parties before she left the first time. She was not entitled to any better treatment merely because she had been away, and she could not reasonably be disappointed if her reception was a little cold. The husband's resentment over her removing their son from the matrimonial home should not be held against him.

[MORRIS L.J. The question is: has there been a resumption of such cohabitation as there had been before? Even though it had not been a very happy marriage, the justices have found that what she came back to was something worse, for she was treated as something less than a housekeeper.]

Then the justices failed to take into proper account the wife's own evidence, which was that for at least three of the four days they resumed life together on the same terms as before. The mere fact that the husband did not make conversation or exhibit friendliness and love did not mean that they had not resumed cohabitation. Reconciliation, in the sense of full forgiveness, with both parties agreeing to put everything that has happened behind them for good, is not really the essential element in a case where there has been a clear agreement by which the wife's only cause of complaint—the son—has been removed. The test to apply is that of Hodson L.J. in *Perry* v. *Perry* [13]—to consider the facts in each case carefully, "because if it be found that there has "really been a mutual coming together for however short a time, "it is clear that in such a case desertion has been terminated." When this wife was received back as she was, her cause of complaint had gone, and the original desertion, if any, came to an end.

---

[12] [1950] P. 1.

[13] [1952] P. 203, 232.

Elwyn Jones replied.

Note.—The case is reported only on the question whether the period of the alleged constructive desertion was terminated by the agreement of the wife to return home if the son left.

DENNING L.J. I will ask Hodson L.J. to give the first judgment.

HODSON L.J. stated the facts and continued: The justices found (on March 30, 1955) that the desertion had been proved. It was from that finding that the husband appealed, because the effect of it was that he had deserted his wife on November 15, that that desertion had continued thereafter notwithstanding the events which had happened, and that there had never been any break in that desertion.

The Divisional Court considered first the question of the original parting, and I think assumed in the wife's favour that which the magistrates had found, namely, that by acting as he did in refusing to get rid of his son, the husband had driven his wife away and put a barrier against her return so long as the son was there. So far as that alleged desertion was concerned, it was argued that it had been terminated because the son had left the house, the wife's case having always been "If the son "goes I will come back"; and she had gone back.

There has been a good deal of discussion about the various ways in which desertion could be terminated, and much attention has been given to termination by resumption of cohabitation; but that is not the only way in which desertion can be terminated. In *Perry* v. *Perry*[1] I said: "Accordingly, in my opinion, as I "ventured to suggest in *Lane* v. *Lane*,[2] when considering a "current period of desertion, the primary question is: Aye or No, "'is it terminated?'—not 'is it condoned?' It can be terminated "by a resumption of cohabitation involving a mutual or, as it has "been called, a bilateral act, or it can be terminated by the "deserter returning, or even offering to return, provided the "offer is not one which for some reason the offeree is entitled to "refuse, but it is not necessarily terminated as a matter of law "by the sexual act." In the present case, in my view, the desertion, which was constructive desertion, was terminated when the basis of that constructive desertion had been removed by agreement. I do not think that it is necessary to consider whether there had been a resumption of cohabitation in the full sense of the word, or reconciliation. What happened here was that the husband had first of all refused to get rid of his son and the wife said "I will not live with you unless you do," and when he got rid of the son the position was that by agreement that desertion was terminated.

---

[1] [1952] P. 203, 232; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076.

[2] [1952] P. 34; [1952] 1 T.L.R. 250; [1952] 1 All E.R. 223n.

[His Lordship then said that the court would not interfere with the order of the Divisional Court for a rehearing, and referred to the subject-matter for the rehearing, namely, the events after the wife's return on February 27, and continued:] The way in which I respectfully differ from the magistrates is that I think that the first desertion was at an end when the condition which the wife insisted on was complied with; and they (the magistrates) must look at the matter afresh to see whether a new period of desertion started on the second occasion when she left on March 4, 1955. The position then was entirely different from what it had been before. The son had gone. I do not for myself feel that it is facing realities to regard the whole period as one continuous whole running from November 15, 1954, until the hearing before the justices on March 30. In my view, therefore, the appeal from the Divisional Court should be dismissed.

Denning L.J., after stating the facts, continued: I must say that on those facts I cannot see that the husband was guilty of constructive desertion. It seems to me that, if anyone did any driving out, it was the son who drove out his mother. It is quite unreal to say that the father drove out his wife simply because he said: "You cannot turn out your own flesh and blood." But however that may be, if there was constructive desertion by the father in the first instance, it seems to me that it terminated when the wife returned in pursuance of the arrangement which they made. It is true that there was no resumption of cohabitation in the sense laid down in *Mummery* v. *Mummery*,[3] *Bartram* v. *Bartram*[4] and *Perry* v. *Perry*[5]; but a resumption of cohabitation is not the only way of terminating a desertion. It can also be terminated by an agreement or an arrangement between the parties. When the wife here came back in pursuance of the arrangement, I am clearly of the opinion that, if desertion there was, it was terminated.

---

[3] [1942] P. 107; 58 T.L.R. 203; [1942] 1 All E.R. 553.

[4] [1950] P. 1; 65 T.L.R. 492; [1949] 2 All E.R. 270.

[5] [1952] P. 203.

[His Lordship then referred to the matter for the rehearing, namely, whether the husband's conduct on her return was such that he was guilty of constructive desertion, and concluded:] I agree with my Lord that this appeal should be dismissed.

MORRIS L.J. As my Lords have formed a clear view in regard to this matter, and as it must go back to the justices, I do not propose to say any more than to indicate some doubts that I had during the hearing. I feel that this was a difficult case for the justices, and I do not in any way differ from the way in which the law has been stated by my Lords. The doubt that I have had is whether it does appear that the justices made a wrong approach. The case was argued before us on the assumption that there had been desertion in the initial period. That was, of course, not conceded. The question argued before us was whether there was a resumption of the marital relationship or, perhaps, as the question ought to be stated, whether the desertion was terminated.

Hodson L.J. stated the matter in *Perry* v. *Perry*[6]: "Accordingly, in my opinion, as I ventured to suggest in *Lane* "v. *Lane*,[7] when considering a current period of desertion, the "primary question is: Aye or No, 'is it terminated?'—not 'is "'it condoned?' It can be terminated by a resumption of "cohabitation involving a mutual or, as it has been called, a "bilateral act, or it can be terminated by the deserter returning, "or even offering to return, provided the offer is not one which "for some reason the offeree is entitled to refuse, but it is not "necessarily terminated as a matter of law by the sexual act." A little further on my Lord said[8]: "At the same time, the facts "in each case must be carefully considered, because if it be "found that there has really been a mutual coming together for "however short a time, it is clear that in such a case desertion "has been terminated."

Now, this being a case of constructive desertion, the matter was viewed by the justices on the basis that the husband by his conduct towards his wife had made it impossible for her to remain. That conduct manifested itself in the attitude of the husband in regard to the son's presence; but, of course, the matter has to be reviewed in the light of the husband's conduct vis-à-vis his wife.

---

[6] [1952] P. 203, 232.
[7] [1952] P. 34.
[8] [1952] P. 203, 232.

C. A.
1955

HARVEY
v.
HARVEY.

Morris L.J.

Was the husband making it impossible for the wife to stay? The doubt that I have had is whether the justices were not entitled to say that the husband continued during the few days when the wife was back in the house to make it impossible for her to stay, though he manifested his attitude to her in a different manner and by different conduct, and whether on that view it might be said that there had not been an end of the desertion, but that there was a continuing desertion. But, having indicated this doubt, in view of the fact that my Lords have formed a clear view, I do not dissent from what they have said.

Appeal dismissed.
Case remitted to justices for rehearing.

Solicitors: *Rhys Roberts & Co. for Leo Abse & Cohen, Cardiff; Wrentmore & Son for H. Morgan Lloyd & Evans, Cardiff.*

M. M. H.

1955
Oct. 18.

Sachs J.

IN THE ESTATE OF POWE, DECD.
POWE v. BARCLAYS BANK LTD.
(POWE AND OTHERS CITED.)

Evidence—Evidence Act, 1938*—Admissibility—Document—Document dictated to solicitor's typist and amended personally—"Person "interested"—Note as to matters relevant to execution of will—Solicitor then acting for executor—Solicitor responsible for preparation and execution of will—Possible reflection on reputation in event of contest—Not a "person interested"—Evidence Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1 (3) (4).

During the hearing of a probate action the question arose whether a contemporary typed note produced by a witness who was the solicitor who had prepared the will and had been responsible for seeing that it was executed, and who had been acting at the time for the executor named in it, was admissible in evidence. The note had been dictated by the solicitor, but although it had been checked by him and amended in his own hand he had neither initialled nor signed it:—

Held, (1) that the document was admissible under the provisions of section 1 (4) of the Evidence Act, 1938, as being "made "or produced" by the solicitor "with his own hand." It did not matter if the typewriting had been done by someone else if the witness himself had seen the document, checked it, and written upon it.

(2) That, although one reason why a record of an important conversation is kept is in case there is any dispute, the evidence did not show that "proceedings were . . . anticipated" within the meaning of section 1 (3) of the Act when the document in question was made.

(3) That the prospect that the solicitor might act for the executor if the will were contested did not make him "a person "interested" within the meaning of section 1 (3).

In the Estate of Hill, decd. [1948] P. 341; [1948] 2 All E.R. 489 considered.

(4) That having regard to the time when the document was made it was not inadmissible on the ground that it might be against the solicitor's reputation if the validity of the will, for the preparation and due execution of which he had been responsible, were later contested. There was no "motive to misrepresent" the facts.

PROBATE ACTION.

During the hearing of the action, in which the plaintiff sought revocation of a grant of probate given to the defendant bank in respect of a will dated June 18, 1952, and asked for probate of an earlier will dated June 9, 1952, a question arose as to whether a certain document was admissible in evidence. That document was a lengthy note, made immediately after the events and interviews which led to the execution of the will of June 18, 1952, by a witness, Port, who was the solicitor who had prepared the will for the testator. The document itself was brought into existence by dictation to a typist, followed by a checking of the typescript by the witness, followed by the writing of amendments by him on the face of the document. The document had, however, been neither initialled nor signed by him. It was sent to the bank, for whom the solicitor acted and which was named as executor in the will, by the firm in which the witness was the "sole partner." The witness stated in evidence that he had done this because he realized that the occasions to which the notes referred were "very important business and, as a careful lawyer, "I determined to make a record of what was done," and he added that it was his duty to make such a record.

Richard Beddington for the defendant submitted, inter alia, that the document was admissible as part of the res gestae and under the Evidence Act, 1938.

Harold Heathcote-Williams Q.C. and *Dimitry Tolstoy* for the parties cited supported his submission.

J. E. S. Simon Q.C. and *H. Lightman Q.C.* for the plaintiff. It is accepted on behalf of the plaintiff that the note would come

1955

In the Estate of Powe, decd.

within section 1 (1) of the Evidence Act, 1938, but it is contended that it is excluded by section 1 (3) and section 1 (4) of that Act.[1] As to subsection (3), the solicitor was "a person "interested" because he was acting for the bank, which was made executor under the will, and he might reasonably expect to act for the bank in the event of a dispute; the statement had been made in anticipation of a possible dispute as to the validity of the will and of consequent proceedings, and to perpetuate testimony for use in any such proceedings. A solicitor, moreover, is necessarily "interested" on behalf of his client, and *In the Estate of Hill, decd.*,[2] is to be distinguished, for while in that case the statement had been made by a servant of the firm of solicitors concerned, in the present the "person" was the principal of the firm. In such circumstances there was a direct financial interest.

It is further submitted that the document is inadmissible by reason of section 1 (4), for the statement was not "written, "made or produced" by the solicitor "with his own hand"; it was the typist's hand. The subsection did not include corrections—there must be a recognition in writing.

Sachs J. gave the following judgment upon the question of admissibility: The grounds on which it is sought that this document be admitted are, first, that it became admissible by reason of Mr. Simon's cross-examination—and on that point I was against Mr. Beddington; secondly, that it was part of the res gestae—and on that point, too, I was against Mr. Beddington. There remains the ground of its admissibility under the Evidence Act, 1938. Against that Mr. Simon has taken three points. First of all he says that under section 1 (4) of the Act it cannot be said to be a "document . . . written, made or produced by [the "witness] with his own hand . . . or otherwise recognized by him "in writing as one for the accuracy of which he is responsible"—a point which could not have arisen had the witness initialled the notes after checking them. My own view is that a document which is dictated, checked and then amended in writing by a witness, is certainly one which comes within the ambit of the Evidence Act, 1938, as being one that was "made or produced" by that witness "with his own hand." It does not matter if in fact he secured the intervention of someone else to do the actual typewriting, provided that he himself sees it, checks it, and writes upon it.

---

[1] Evidence Act, 1938, s. 1 (3): "Nothing in this section shall render "admissible as evidence any state-"ment made by a person interested "at a time when proceedings were "pending or anticipated involving a "dispute as to any fact which the "statement might tend to establish."
Subs. (4): "For the purposes of "this section, a statement in a docu-"ment shall not be deemed to have "been made by a person unless the "document or the material part "thereof was written, made or pro-"duced by him with his own hand, "or was signed or initialled by him "or otherwise recognized by him in "writing as one for the accuracy of "which he is responsible."

[2] [1948] P. 341; [1948] 2 All E.R. 489.

It was then argued that the document fell to be excluded under section 1 (3) of the Act. One point which arose out of that subsection was whether this document was made "at a time "when proceedings were . . . anticipated involving a dispute "as to any fact which the statement might tend to establish." I have not the slightest doubt in my mind that Mr. Port was telling the truth when he said that because everyone seemed so happy he had no impression that the validity of the document would ever in future be challenged. It is, of course, axiomatic that in almost every case one reason why a record of an important conversation is kept is in case there is any dispute, but that does not of itself normally cause subsection (3) to apply. I do not think in the present case that at the time the document was made there was anything which could be said to make it a time when "proceedings were anticipated" within subsection (3).

The next point argued was as to whether the witness was a "person interested" within the meaning of subsection (3). Mr. Simon put forward the fact that the solicitor had at any rate a reasonable chance of acting for Barclays Bank (the executors) as constituting an "interest." For my part I do not think that a contingent prospect of that sort can be an "interest" in the sense that this subsection contemplates. I would add that otherwise every solicitor acting in any matter in which there could be any dispute, and in which accordingly there was at any rate a chance that he might be employed, would never be able to make a record which could be evidence in a court of law. I would also add that I think that Mr. Simon's submission on that point runs counter to the reasoning implicit in Wallington J.'s decision in *In the Estate of Hill, decd.*[1]

There remains a point which has not been really pursued by Mr. Simon, but with which I think I had better deal. It is the point that it might be against a solicitor's reputation if a will which he is charged with preparing and seeing executed turns out not to be properly made. That is a point which is to some

---

[1] [1948] P. 341.

1955

In the Estate of Powe, decd.

Sachs J.

extent indicated in *In the Estate of Hill, decd.*,[1] and is also in *Barkway* v. *South Wales Transport Co. Ltd.*[2] But here again I think that one has to look at the time when the document was made. Both *In the Estate of Hill, decd.*[3] and *Barkway* v. *South Wales Transport Co. Ltd.*[4] refer to documents made at a time later than the actual happening of the facts to which the writing relates—and when litigation was already pending or anticipated. Here again one notes that if the risk that a solicitor's conduct might later be called into question were an " interest " within the meaning of subsection (3), then all records of solicitors on such matters would tend to be excluded; that seems to me not only contrary to common sense and contrary to the practice of this Division but also contrary to the law implicit, I think, in the many decisions (such as *Esch* v. *Nelson* [5]) concerned with the records of deceased solicitors. These records have regularly been admitted after the solicitor had died under the rule that a statement made in the course of his duty by a deceased person is admissible providing that he had (to use the words of Phipson on Evidence, 9th ed., at p. 301) no " motive to misrepresent " the facts related in the document. Some of the old decisions as to what does and what does not constitute a motive to misrepresent facts seem to me to afford assistance, as here, on the meaning of the word " interest " in the Evidence Act, 1938.

I rule that the document is admissible and have thus stated my reasons because of the importance of the particular point rather than the importance in this case of the particular document. As to the weight of the document, I will give guidance to the jury in due course.

Document admitted.

[The hearing of the action continued.]

Solicitors: *Oscar Mason & Co.; E. B. V. Christian & Co. for Fillmer & Port, Brighton; George & George.*

J. B. G.

---

[1] [1948] P. 341.

[2] [1949] 1 K.B. 54; 64 T.L.R. 462; [1948] 2 All E.R. 460.

[3] [1948] P. 341.

[4] [1949] 1 K.B. 54.

[5] (1885) 1 T.L.R. 610.

RAMSAY-FAIRFAX (*orse.* SCOTT-GIBSON) *v.* RAMSAY-FAIRFAX.

1955
May 26, 27;
June 7.

Willmer J.

C. A.

1955
Nov. 14, 15.

Denning, Hodson and Morris L.JJ.

Husband and Wife—Nullity—Jurisdiction—Residence—Voidable marriage—Parties resident in England—No English domicile—Jurisdiction of English courts to annul void or voidable marriage where parties resident in jurisdiction—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 22—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 21, 32.

At a time when the parties to a marriage celebrated in Egypt under the Foreign Marriage Act, 1892, were resident in England though domiciled in Scotland, the wife presented in England a petition for nullity on the grounds of her husband's incapacity or wilful refusal to consummate the marriage. The husband appeared under protest, denying that the English court had jurisdiction to hear the petition.

Willmer J. held that since both parties were resident in England at the date of the petition the court had jurisdiction to hear it; for the court had an inherent jurisdiction inherited from the ecclesiastical courts to entertain proceedings for nullity of a voidable marriage where the parties were resident but not domiciled in England; and that jurisdiction had not been affected by section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, which was intended to have an enlarging, not a restrictive, operation. On appeal by the husband:—

Held, that as both parties were then resident in England, the court had jurisdiction to hear the petition.

Per Denning L.J. It may be in these nullity cases that the courts of the domicile also have jurisdiction: so may the courts of the place where the marriage was celebrated.

Dictum of Viscount Jowitt L.C. in *Baxter* v. *Baxter* [1948] A.C. 274, 285; 64 T.L.R. 8; [1947] 2 All E.R. 886 applied.

Easterbrook v. *Easterbrook* (*orse. Jervis*) [1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90 and *Hutter* v. *Hutter* (*orse. Perry*) [1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368 approved.

Inverclyde (*orse. Tripp*) v. *Inverclyde* [1931] P. 29; 47 T.L.R. 140 overruled.

Decision of Willmer J. affirmed.

Issue as to jurisdiction to hear a wife's petition for nullity.

The parties were married in Egypt on November 22, 1947, according to the provisions of section 22 of the Foreign Marriage Act, 1892, the husband being, at all material times, an officer serving in Her Majesty's forces.

They lived together for a short time in Egypt, but after a while they quarrelled and separated, and in 1948 the husband, whose domicile of origin was Scottish, was posted back to the

United Kingdom to Scottish Command. The wife remained in Egypt, but later moved to Cyprus where she resided, apart from a brief visit to the United Kingdom in 1950, until 1953.

In 1951 the husband was posted to Chessington, Surrey, and served there until shortly before the hearing of the present proceedings. In May, 1953, the wife returned to England, and in July she joined the husband in a house which he had bought in Kingston, Surrey, where they lived together. They continued to live there until November, 1953, when they quarrelled; the wife left and went to live in London. The husband continued to live in the house at Kingston until after the filing of the wife's petition on March 2, 1954, in which she prayed for a decree of nullity on the ground of the husband's wilful refusal to consummate the marriage or, alternatively, on the ground of his incapacity.

The wife contended, in the present issue, that the court had jurisdiction to entertain the petition on the basis of the parties' English domicile or, alternatively, their residence in England at all material times. The husband, who had, in December, 1954, instituted proceedings against the wife in Scotland raising similar allegations against her and himself praying for a decree of nullity, appeared under protest, alleging that he was domiciled in Scotland and denying that the court had jurisdiction.

At the hearing of the issue Willmer J. held, on the facts, that the husband was at the material times domiciled in Scotland; the question, therefore, arose whether the court had jurisdiction on the basis of the parties' residence in England when the wife's petition was presented. The case is reported only on the latter issue.

R. J. A. Temple Q.C. and *H. S. Law* for the husband.
R. C. Vaughan Q.C. and *S. L. Elborne* for the wife.

The argument before Willmer J. was substantially the same as that in the Court of Appeal (infra).

Cur. adv. vult.

June 7. WILLMER J. read a judgment in which he stated the facts, observing that the marriage under section 22 of the Foreign Marriage Act, 1892, had the same validity as if it had been celebrated in the United Kingdom, and held that the husband was at the material times domiciled in Scotland. His Lordship continued: I pass now to the second, and more difficult, question—whether this court has jurisdiction, in proceedings for nullity such as these, on the basis of the parties' residence in England. As to this there is no room for doubt about the facts. The husband, until his recent posting overseas, has been resident in England since 1951, and the wife since the spring of 1953. The parties resided together in England for four months during 1953. Both were resident in England at the time of the filing of the petition.

It is as well to refer at the outset to two circumstances, which are not without importance in considering whether this court has jurisdiction on the basis of the residence of the parties. One is that the grounds on which the wife prays for the decree of nullity are such as, if proved, render the marriage voidable only, and not void ab initio. The other is that the wife does not seek to, and could not, rely on section 18 (1) (*b*) of the Matrimonial Causes Act, 1950,[1] for the reason that she was not ordinarily resident in England for a period of three years immediately preceding the commencement of the proceedings. The question raised before me is whether—apart from the statutory jurisdiction first conferred by the Law Reform (Miscellaneous Provisions) Act of 1949—this court has an inherent jurisdiction, inherited from the old ecclesiastical courts, to entertain proceedings for nullity, in the case of a marriage voidable but not void, where the parties are resident, but not domiciled, in England.

At one time there was authority for the proposition that mere residence of the petitioner wife in England was sufficient to found jurisdiction in nullity, notwithstanding that the husband might be both domiciled and resident elsewhere. This appears to have been the effect of the decision of Sir F. H. Jeune P., in the case of *Roberts* v. *Brennan*,[2] where he is reported to have said [3] that, in nullity cases, jurisdiction is based not on domicile but on residence. By this he must have meant residence of the wife petitioner—for it is clear, on the facts of that case, that the husband respondent was not resident in England. The case was undefended, and does not appear to have been fully argued; moreover, as pointed out by Lord Greene M.R. in a later case,[4] the report of *Roberts* v. *Brennan*[5] is by no means satisfactory.

---

[1] Matrimonial Causes Act, 1950, s. 18: "(1) Without prejudice to any "jurisdiction exercisable by the court "apart from this section, the court "shall by virtue of this section have "jurisdiction to entertain proceedings "by a wife in any of the following "cases, notwithstanding that the "husband is not domiciled in "England, that is to say:— . . . "(*b*) in the case of proceedings for "divorce or nullity of marriage, if the "wife is resident in England and has "been ordinarily resident there for a "period of three years immediately "preceding the commencement of proceedings, and the husband is not "domiciled in any other part of the "United Kingdom or in the Channel "Islands or the Isle of Man."

[2] [1902] P. 143; sub nom. *Brennan* (*orse. Roberts*) v. *Brennan*, 18 T.L.R. 467.

[3] Ibid. 144.

In the more recent case of *White* (*orse. Bennett*) v. *White*[6] it was held by Bucknill J. that a wife was entitled to a decree of nullity for bigamy, against a husband domiciled and resident abroad, on the ground that she herself was domiciled and resident in England. In this case, however, it may well be that the fact of the wife's residence in England was of secondary importance, having regard to the fact that she was in any case domiciled here.

Finally, in *Robert* (*orse. De la Mare*) v. *Robert*,[7] where the parties were domiciled, and the husband was resident, abroad, but the wife was resident in England, it was held by Barnard J. that he had jurisdiction to entertain a petition by the wife for a decree of nullity on the ground of wilful refusal on the part of the husband. In so holding Barnard J. expressly relied[8] on the decision in *White* (*orse. Bennett*) v. *White*.[9]

These three decisions were discussed by the Court of Appeal in *De Reneville* v. *De Reneville*,[10] but it was held, in that case, that residence of the petitioner alone was not sufficient to found jurisdiction in nullity suits. Lord Greene M.R. (with whose judgment Somervell L.J. expressed his concurrence[11]) expressed the opinion[12] that the cases cited could not be accepted as establishing the proposition contended for, and they must, therefore, be taken as overruled, insofar as they were based on the mere residence of the petitioner alone. Both in *De Reneville* v. *De Reneville*,[13] however, and in the later case of *Casey* v. *Casey*,[14] the members of the Court of Appeal expressly left open the question whether the court should exercise jurisdiction over a voidable marriage in a case where both parties have been resident in England.

On this question I am left to obtain what guidance I can from decisions at first instance, and unhappily for me I am confronted with conflicting decisions of this court on the subject. In *Inverclyde* (*orse. Tripp*) v. *Inverclyde*[15] Bateson J. drew a distinction between proceedings for nullity in cases where the marriage is void ab initio and those where the marriage is merely voidable (as is the case here), and held that, in the latter case, nothing short of domicile would suffice to found jurisdiction to entertain the suit. On the other hand, in *Easterbrook* (*orse. Jervis*) v. *Easterbrook*,[16] where the same question arose again, in a suit for nullity on the ground of wilful refusal, Hodson J. declined [17] to follow *Inverclyde* (*orse. Tripp*) v. *Inverclyde*.[18] He stated that he was unable to see the distinction, for the purpose of jurisdiction, between voidable and void marriages, and held that he had jurisdiction on the basis that both parties were at all material times resident in England, and the ceremony of marriage was celebrated in England. The case was undefended, and the judgment of Hodson J. as reported is extremely brief; as he himself pointed out, he heard argument only on behalf of the petitioner. Later in the same year, in *Hutter* v. *Hutter* (*orse. Perry*),[19] another suit for nullity on the ground of wilful refusal, the same question once more arose, this time before Pilcher J. On this occasion, Pilcher J., being confronted with the conflicting decisions in *Inverclyde* (*orse. Tripp*) v. *Inverclyde* [20] and *Easterbrook* (*orse. Jervis*) v. *Easterbrook*,[21] called for the assistance of the King's Proctor under section 181 of the Supreme Court of Judicature (Consolidation) Act, 1925, and the question was fully argued before him by the then Attorney-General, Sir Donald Somervell. In the result Pilcher J.,[22] like Hodson J., declined to follow *Inverclyde* (*orse. Tripp*) v. *Inverclyde*,[23] but held that, notwithstanding the foreign domicile of the husband, the fact that both parties were resident in England was sufficient to found jurisdiction, more particularly as the marriage had been celebrated in England.

---

[4] *De Reneville* v. *De Reneville* [1948] P. 100, 116; 64 T.L.R. 82; [1948] 1 All E.R. 56.

[5] [1902] P. 143.

[6] [1937] P. 111; 53 T.L.R. 442; [1937] 1 All E.R. 708.

[7] [1947] P. 164; 63 T.L.R. 343; [1947] 2 All E.R. 22.

[8] [1947] P. 167.

[9] [1937] P. 111.

[10] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.

[11] [1948] P. 123.

[12] Ibid. 118.

[13] Ibid.

[14] [1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110.

[15] [1931] P. 29; 47 T.L.R. 140.

The decision of Pilcher J. was founded on the fact that the jurisdiction of the court in respect of nullity—though enlarged by statute in 1937, in the sense that new grounds were prescribed for granting this form of relief—was in essence derived from that of the old ecclesiastical courts.[24] By contrast the jurisdiction in divorce is wholly statutory, the remedy of divorce having been conferred only in 1857 by the same statute which created the new Court for Divorce and Matrimonial Causes. The jurisdiction of the ecclesiastical courts in respect of matters within their competence depended, as a matter of history, on the residence of the respondent within the territorial jurisdiction of the particular court before which he was cited to appear. The ecclesiastical courts granted decrees for nullity both in the case of marriages which were void, e.g., on the ground of bigamy, and in the case of marriages which were voidable on the ground of incapacity, no distinction being drawn between the two classes of case for the purpose of jurisdiction. When, by the Act of 1857, the matrimonial jurisdiction of the ecclesiastical courts was transferred to the new court, it was specifically provided by section 22 of the Act that in all suits and proceedings—other than proceedings for the new remedy of divorce—the court should proceed and act and give relief on principles and rules which in the opinion of the court should be "as nearly as may be conformable to the principles "and rules on which the Ecclesiastical Courts have heretofore "acted and given relief." That section was repealed by the Judicature (Consolidation) Act, 1925, but its substance was re-enacted by section 32 of the latter Act, which provides in relation to the jurisdiction of the High Court and the Court of Appeal:—" . . . where no special provision is contained in this Act or in "rules of court with reference thereto, any such jurisdiction shall "be exercised as nearly as may be in the same manner as that "in which it might have been exercised by the court to which it "formerly appertained." The argument which prevailed in *Hutter* v. *Hutter* (*orse. Perry*) [25] was that, although since 1857 it has been settled that in relation to the new remedy of divorce jurisdiction depends solely on domicile, the effect of these statutory provisions has been to preserve, in relation to the forms of relief within the competence of the old ecclesiastical courts—including the relief of nullity, whether in respect of void or voidable marriages—the old principle of the ecclesiastical courts, whereby jurisdiction depended on residence.

---

[16] [1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90.

[17] [1944] P. 10, 11.

[18] [1931] P. 29.

[19] [1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368.

[20] [1931] P. 29.

[21] [1944] P. 10.

[22] [1944] P. 95, 104, 108.

[23] [1931] P. 29.

[24] [1944] P. 95, 104–5.

The contrary decision of Bateson J. in *Inverclyde* (*orse. Tripp*) v. *Inverclyde* [26] was based largely on *Salvesen* (*or von Lorang*) v. *Austrian Property Administrator*,[27] and more particularly upon a dictum of Lord Phillimore.[28] In that case a German court, admittedly the court of the domicile, had pronounced a decree of nullity on the ground of irregularity in the marriage ceremony. The House of Lords held that such a decree, being pronounced by the court of the domicile, amounted to a judgment in rem which was binding in Scotland. All their Lordships held that the court of the domicile was a competent court to pronounce such a decree, but Lord Phillimore went further and expressed the view that it was the only competent court. This dictum was not, of course, necessary for the decision, but in *Inverclyde (orse. Tripp)* v. *Inverclyde* [29] Bateson J. adopted it [30] and made it the basis of his judgment. He emphasized the distinction between void and voidable marriages, holding that the remedy in the latter case, though in form a decree of nullity, was in all essentials the same as a decree of dissolution; for, as he pointed out, in the case of a voidable marriage the marriage continues in being until one of the spouses seeks to get rid of the tie. A decree of nullity pronounced in such a case, like a decree of dissolution, alters the status of the parties. Such a decree, in the view of Bateson J. being a judgment in rem, could be pronounced only by the court of the parties' domicile.[31]

---

[25] [1944] P. 95.

[26] [1931] P. 29.

[27] [1927] A.C. 641; 43 T.L.R. 609.

[28] [1927] A.C. 671.

It is to be presumed that Bateson J. would have decided otherwise if the case before him had been one of a marriage void ab initio. In the present case counsel for the husband did not dispute that, in the case of a marriage void ab initio, jurisdiction to pronounce a decree of nullity might be based on residence. But it is to be remarked that in none of the speeches in *Salvesen (or von Lorang)* v. *Austrian Property Administrator* [32] was any distinction drawn between void and voidable marriages. The dictum of Lord Phillimore,[33] relied on by Bateson J., was apparently intended to apply to any decree of nullity, and not only to a decree pronounced in the case of a voidable marriage—indeed, the case before the House was a case of a marriage void ab initio. The distinction between void and voidable marriages is of course vital for some purposes—e.g., for the purpose of determining the domicile of a petitioning wife, so as to found jurisdiction, in a case where the husband is both domiciled and resident abroad (see *De Reneville* v. *De Reneville*,[34] and cf. *Chapelle* v. *Chapelle*,[35] in which I attempted to follow the reasoning of the Court of Appeal in *De Reneville* v. *De Reneville*.[36] But it does not follow from this that, for the purpose of determining jurisdiction where both parties are resident in England, the distinction between void and voidable marriages is necessarily of any relevance. In either event the remedy available today, as it was in the days of the ecclesiastical courts, is a decree of nullity. However anomalous it may seem, the legislature has enacted that the remedy for wilful refusal shall be a decree of nullity, and not, as might perhaps have been expected, a decree of dissolution. Since the remedy available today, whether the marriage be void or voidable, is the same as that which was available in the ecclesiastical courts, it is difficult to criticize the reasoning of Pilcher J. in *Hutter* v. *Hutter* (*orse. Perry*),[37] when he held that the same test of jurisdiction should be applied. *Hutter* v. *Hutter* (*orse. Perry*)[38] was cited both in *De Reneville* v. *De Reneville*[39] and in *Casey* v. *Casey*,[40] and, though they expressly left the point open, none of the members of the Court of Appeal in either case expressed any adverse criticism of the reasoning of Pilcher J. The contrary decision in *Inverclyde* (*orse. Tripp*) v. *Inverclyde*[41] has not received by any means universal approval, but has been adversely criticised by several of the leading textbook writers—see, for instance, Rayden on Divorce.[42] See also the commentary by Mr. J. E. S. Simon, printed as an Appendix to the Supplement to the 5th Edition.[43]

---

[29] [1931] P. 29.
[30] Ibid. 44.
[31] Ibid. 49–50.
[32] [1927] A.C. 641.
[33] Ibid. 671.
[34] [1948] P. 100.
[35] [1950] P. 134; 66 T.L.R. (Pt. 1) 109; [1950] 1 All E.R. 236.
[36] [1948] P. 100.

Since the date of the authorities to which I have referred, section 1 of the Law Reform (Miscellaneous Provisions) Act, 1949, repealed and substantially re-enacted in section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, has, in certain instances, enlarged the jurisdiction of the court in nullity and divorce proceedings in cases where relief is sought by a wife resident in England against a husband domiciled abroad. [His Lordship referred to the relevant passages of the section and continued:] Counsel for the husband sought to found an argument on this section, as showing that apart from it there could not have been any jurisdiction in nullity based on mere residence of the parties. Why, he asked, if the residence of the parties in England (wherever they may be domiciled) is sufficient to found jurisdiction in nullity, did the legislature introduce the proviso that the husband must not be domiciled in any other part of the United Kingdom? The legislature, he argued, must have contemplated that in nullity, as in divorce, there could, apart from the section, be no jurisdiction based on mere residence.

It seems to me that there are two answers to this argument. First, it is clear that the section is intended to have an enlarging, and not a restrictive, operation. The decision in *Hutter* v.

---

[37] [1944] P. 95.

[38] Ibid.

[39] [1948] P. 100, 117.

[40] [1949] P. 420, 433.

[41] [1931] P. 29.

[42] 6th ed., pp. 37–8, n. (*h*).

[43] A. 175.

Hutter (*orse. Perry*)[44] must have been before the draftsman, and the section cannot be read as taking away a jurisdiction held to exist in *Hutter* v. *Hutter* (*orse. Perry*)[45] if that case was rightly decided. In fact the section enlarges the rights of a wife far beyond anything contended for here—for it gives her rights against a husband both domiciled and resident elsewhere, provided the condition as to three years' residence is satisfied. In effect the section restores the decision in *Robert* (*orse. De la Mare*) v. *Robert*,[46] subject to the three years' qualification. Secondly, the section is expressed to be without prejudice to any jurisdiction exercisable apart from the section. It is clear, in my judgment, that these words were intended to save any jurisdiction in nullity that might be exercisable apart from that based on domicile. This, I think, becomes all the clearer if one looks at the wording of section 1 of the Act of 1949. Subsection (1) of that section makes provision only for jurisdiction in divorce; jurisdiction in nullity is provided for by subsection (2), which is in the following terms: "Without prejudice to any jurisdiction exercisable by the "court apart from this section, the foregoing provisions of this "section shall apply to proceedings for nullity of marriage as "they apply to proceedings for divorce."

Counsel for the husband further pointed out, as part of his argument, that if jurisdiction to entertain proceedings for nullity on the ground of wilful refusal can be based on the mere residence of the parties, the same must apply to proceedings for nullity on any of the other grounds set out in section 8 of the Matrimonial Causes Act, 1950. I accept that this must be so, but it seems to me that it may well be thought no more than consonant with natural justice, as an illustration will show. Suppose a foreign husband, domiciled abroad, contracts a marriage with an English wife, and resides with her in this country, only to discover that she was, for instance, suffering from venereal disease in a communicable form at the time of the marriage. I see nothing repugnant to natural justice in supposing that Parliament intended that such a husband should have his remedy in this country. Or what of the converse position of a wife, who marries, and resides in England with, a foreign husband domiciled abroad? If the argument for the husband is right, that no court other than that of the domicile has jurisdiction to annul a voidable marriage, such a wife would have no remedy under section 8. She could, however, proceed under section 18 (1) (*b*), provided she could satisfy the requirement of showing three years' residence. But if she has only recently taken up residence in this country, she may be out of time if she waits until the three years prescribed by section 18 (1) (*b*) have elapsed—for under section 8 she can only obtain relief if the proceedings are instituted within a year from the date of the marriage. This would indeed be a curious result. It seems to me, in the result, that any argument based on section 18 (1) (*b*) of the Act—bearing in mind the various grounds prescribed by section 8 on which proceedings for nullity can be based—if it helps at all, tends to support the wife's rather than the husband's case.

---

[44] [1944] P. 95.

[45] Ibid.

[46] [1947] P. 164.

Counsel for the husband further argued that jurisdiction based on residence of the parties is an exception to the general rule that matrimonial proceedings must be based on domicile, and should not be extended—certainly not to proceedings for nullity in respect of a voidable marriage. Bearing in mind that the matrimonial jurisdiction of the ecclesiastical courts was founded entirely on residence, it would, in my judgment, as a matter of history, be truer to say that domicile as the test of jurisdiction in proceedings for divorce was rather the exception to the rule. It is an exception resulting from the special provision of the very statute which first created the remedy of divorce, and which, in relation to other older remedies, specifically preserved the principles and rules hitherto acted upon by the ecclesiastical courts.

At this stage it may be remarked that Dr. Cheshire, in his book on Private International Law,[47] is extremely critical of the argument which found favour in *Hutter* v. *Hutter* (*orse. Perry*),[48] i.e., that the court today has jurisdiction in nullity where the parties are resident in this country because, historically, the matrimonial jurisdiction of the ecclesiastical courts was based on residence. He points out that, owing to the uniformity of matrimonial law and practice throughout Christendom, the early church courts were not troubled with questions of the conflict of laws; the ecclesiastical rule as to residence dealt with questions not of international jurisdiction but of local competence. Dr. Cheshire adds that the ecclesiastical rule "is scarcely a sure "guide in days when the unity is a memory of the past, and if "residence is to form a basis of jurisdiction it is in reason rather "than in the history of a past age that it must find its vindica-"tion." What he means is, I think, made clear by an earlier passage,[49] where he suggests that, if the matter is viewed in the light of convenience and natural justice, to confine jurisdiction in nullity to the court of the domicile is open to practical and serious objection—for it may deny relief to parties in a country where they have long been resident, though not technically domiciled. In other words, common sense and reason demand that the court of the common residence should have jurisdiction, subject, however, to the proviso, on which Dr. Cheshire insists, that the court applies the proper law, i.e., the law of the domicile. This latter point is not one of any consequence in the present case; for I have an affidavit from a Scottish lawyer which satisfies me that, in relation to proceedings such as these, Scots law—i.e., the law of the domicile—is the same as English law.

---

[47] 4th ed., p. 339.

[48] [1944] P. 95.

If this be the correct view, it amounts, in effect, to saying that *Hutter* v. *Hutter* (*orse. Perry*) [50] was rightly decided, but for the wrong reasons. It is a view which, I think, gains some support from the observations made by members of the Court of Appeal in *Casey* v. *Casey*.[51] In that case Bucknill L.J., with whose judgment Cohen L.J. expressed his complete agreement,[52] said [53]: "There may be considerable hardship to the petitioner in "refusing jurisdiction where both parties are resident within "the jurisdiction"; he then made it clear [54] that his opinion in favour of dismissing the appeal was based partly on the balance of hardship to the parties. Somervell L.J. said [55]: ". . . there "seem to me to be considerable reasons of convenience for giving "the courts where the respondent or both parties reside jurisdic-"tion in this class of case, and I would desire, so far as this "court is concerned, to keep that point open until it arises."

I confess that I regard the question I have to decide as one of no little difficulty. The only material distinction on the facts between this case and *Hutter* v. *Hutter* (*orse. Perry*) [56] lies in the fact that in the latter case the marriage was celebrated in this country, whereas here it was celebrated in Egypt in pursuance of section 22 of the Foreign Marriage Act, 1892. I cannot think that this distinction makes any difference. After careful consideration I do not feel able to do other than follow the decision of Pilcher J. in *Hutter* v. *Hutter* (*orse. Perry*),[57] a case which has twice been considered and discussed by the Court of Appeal without adverse comment.

---

[49] 4th ed., pp. 333–4.
[50] [1944] P. 95.
[51] [1949] P. 420.
[52] Ibid. 434.
[53] Ibid. 429.
[54] Ibid. 431.
[55] Ibid. 433.
[56] [1944] P. 95.
[57] Ibid.

It follows that, in my judgment, notwithstanding the Scottish domicile of the husband, the parties being at all material times resident in England, this court has jurisdiction to entertain the suit.

Rule accordingly.

Solicitors: *G. P. Voss M.C.; Lee, Ockerby, Johnson & Co.*

E. J.

The husband appealed.

R. J. A. Temple Q.C. and *H. S. Law* for the husband. On the facts in the present case, where the parties were married in Cairo and are domiciled in Scotland, the courts which have jurisdiction in nullity proceedings, in respect of a marriage which is voidable but not void ab initio, are the courts of the domicile. The ecclesiastical courts, from which the jurisdiction in nullity was transferred to this High Court by the Matrimonial Causes Act, 1857, would have regarded these parties as foreign-domiciled parties married abroad, and it is doubtful whether they would have exercised jurisdiction over such a suit. Those courts were the courts of Christendom, local and circumscribed in their limits: Ecclesiastical Jurisdiction Act, 1531 (23 Hen. 8, c. 9). They drew no distinction between void and voidable marriages, and the form of decree was the same for both, though the marriage void ab initio needed no sentence of avoidable: see Shelford on Marriage and Divorce (1841 ed.), pp. 479–482. When the ecclesiastical courts took jurisdiction based on a sojourn of the parties within the jurisdiction, they were concerned with procedure, and were not exercising the general jurisdiction which the court now exercises in proceedings for nullity. [*Niboyet* v. *Niboyet* [1] was referred to.] In 1793 jurisdiction was taken ex necessitate in *Lindo* v. *Belisario* [2] to prevent a failure of justice; the jurisdiction taken in *Harford* v. *Morris* [3] does not affect the principle relied on in *Lindo's* case,[4] for *Harford* v. *Morris* [5] was a case where the marriage was void ab initio, and it is conceded that the courts of residence have jurisdiction in such proceedings for nullity at the suit of either party. But jurisdiction need not be taken ex necessitate in 1955 in regard to parties domiciled in Scotland.

[1] (1878) 4 P.D. 1, 5.
[2] (1795) 1 Hag.Con. 216.
[3] (1776) 2 Hag.Con. 423.
[4] 1 Hag.Con. 216.
[5] 2 Hag.Con. 423.

Moreover, in *De Reneville* v. *De Reneville*,[6] it was said that there is no jurisdiction ex necessitate.

A decree of nullity of a voidable marriage today—for instance, on the ground of wilful refusal—is akin to a decree for dissolution of marriage, because each produces a change of status. Both decrees are decrees in rem, having universal validity, and ought therefore to be made only by the courts of the domicile: see *Salvesen* (*or von Lorang*) v. *Administrator of Austrian Property*,[7] where Lord Phillimore said [8] that the court of the parties' domicile was the only competent court, for its judgment would be universally binding and would ascertain and determine the status of the parties once and for all.

[DENNING L.J. But as the parties in that case were both resident and domiciled in Wiesbaden, that *would* be the only competent court. One cannot assume that Lord Phillimore's mind was directed beyond the particular facts of that case to one in which the parties were resident elsewhere.]

His opinion was concurred in by two other members of the House. The ecclesiastical courts, by contrast, were not concerned with domicile in the technical sense, and their remedies did not produce change of status: *Armytage* v. *Armytage* [9] and *Anghinelli* v. *Anghinelli*.[10] Nor did they regard a sentence of nullity as producing the full effect of a decree in rem: see *per* Sir William Scott in *Sinclair* v. *Sinclair*.[11] If the juridical nature of the decree has changed and the decrees of nullity of a voidable marriage and of dissolution of marriage both now produce a decree in rem, then it is submitted that the ecclesiastical jurisdiction cannot be used as the basis for producing that which the ecclesiastical courts did not produce. To exercise it to that end would not be acting " as nearly as may be conformable " to the principles and rules of those courts, as required by section 22 of the Act of 1857 and its modern equivalent, the Supreme Court of Judicature (Consolidation) Act, 1925, s. 32.

[HODSON L.J. But the decree of nullity does not produce a change of status. It is no more than a declaration of status.]

It declares a marriage not to be a marriage. The residence of a wife petitioner as a ground for jurisdiction, whether for dissolution or nullity, is purely statutory; and Parliament has always referred the wife of a husband domiciled in any other part of the

---

[6] [1948] P. 100, 108; 64 T.L.R. 82; [1948] 1 All E.R. 86.

[7] [1927] A.C. 641; 43 T.L.R. 609.

[8] [1927] A.C. 641, 671.

[9] [1898] P. 178; 14 T.L.R. 480.

[10] [1918] P. 247; 34 T.L.R. 438.

[11] (1798) 1 Hag.Con. 294, 297.

C. A.
1955

RAMSAY-FAIRFAX (ORSE. SCOTT-GIBSON) v. RAMSAY-FAIRFAX.

United Kingdom to the court of the husband's domicile: see Law Reform (Miscellaneous Provisions) Act, 1949, and the Matrimonial Causes Act, 1950. So should this wife be referred to the courts of Scotland. The statutory provisions are inroads into the principle that a decree in rem should be made only by the court of the domicile. If jurisdiction based on residence only exists, the statutory provisions relating to the children of a voidable marriage may create confusion at the husband's domicile, for instance, under the Act of 1950, s. 9. It is not possible to fit that legislation into the principles and practice of the ecclesiastical courts prior to 1857.

The distinction between void and voidable marriages for jurisdictional purposes drawn by Bateson J. in *Inverclyde* (*orse. Tripp*) v. *Inverclyde*[12] was correct; for one must look at the substance and not the form of the decree.

[HODSON L.J. I do not think that the distinction was ever drawn until Bateson J. drew it in *Inverclyde's* case,[12] and I do not think that it was ever followed thereafter.]

The ratio decidendi in *Inverclyde's* case[12] was approved by this court in *De Reneville* v. *De Reneville*[13]; and the method of approach there laid down, in the case of a foreign-domiciled husband, shows that it is necessary for the purpose of jurisdiction to distinguish between void and voidable marriages. Support was also given to the decision in *Inverclyde's* case[14] in *Casey* v. *Casey*[15] by this court, which followed the reasoning and produces the result that the court of the residence of both parties has jurisdiction over a void but not over a voidable marriage. The evidence here is that by the law of Scotland this marriage is voidable. Though in *Easterbrook* (*orse. Jervis*) v. *Easterbrook*[16] and in *Hutter* v. *Hutter* (*orse. Perry*)[17] Hodson and Pilcher JJ. respectively declined to follow *Inverclyde* v. *Inverclyde*,[18] the first of those two cases was an undefended action; and in *Hutter* v. *Hutter*[19] the decision was based in part on the weight to be attached to the form of the decree; and inasmuch as weight was also attached to the fact that the marriage took place within the jurisdiction, that was not acceptable to this court in *Casey* v. *Casey*.[20]

---

[12] [1931] P. 29, 40; 47 T.L.R. 140.
[13] [1948] P. 100.
[14] [1931] P. 29.
[15] [1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110.
[16] [1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90.
[17] [1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368.
[18] [1931] P. 29.
[19] [1944] P. 95.
[20] [1949] P. 420.

[DENNING L.J. The decisions in *Easterbrook's* case [21] and *Hutter's* case [22] were followed time after time during and after the war. What is to happen to those parties if the court now holds that it had no jurisdiction?]

If the court took jurisdiction ex necessitate or ex misericordia that does not afford a ground for jurisdiction.

H. J. Phillimore Q.C. and *S. L. Elborne* for the wife. The question of jurisdiction is not entirely academic in the present case, for a decree of nullity in Scotland would give this wife no right to maintenance. It is submitted, first, that the marriage, having taken place under section 22 of the Foreign Marriage Act, 1892, is a marriage within the jurisdiction of the English courts. Secondly, the ecclesiastical courts conceded jurisdiction to the courts in suits for nullity of marriage if both parties were, or the respondent was, resident, or if the last real matrimonial home was within the jurisdiction of those courts; but in practice they recognized only one ground of jurisdiction, namely, the residence of the husband within the court's jurisdiction: see *Donegal* v. *Donegal* [23]; and the commentary summarizing the practice of the ecclesiastical courts in the Appendix to the Supplement to the 5th edition of Rayden on Divorce (A. 175); and Shelford on Marriage and Divorce to the same effect, at p. 486. Those courts would certainly have entertained the present suit where, at the time when the wife filed her petition, the husband was resident within the jurisdiction.

Once that is accepted, it is not necessary to look beyond the statutory provisions, which show clearly that Parliament has said that in dealing with suits for nullity, on whatever ground, the court shall have regard as nearly as may be conformable to the principles and rules of the ecclesiastical courts. International lawyers are naturally attracted to the law of domicile; but Parliament has enacted otherwise, as Viscount Jowitt L.C. recognized in *Baxter* v. *Baxter* [24] when he said that section 22 of the Act of 1857 manifestly applied, among other things, to suits for nullity on the ground of incapacity. Though there is much to be said for applying the law of the domicile, since one then has a determination of the suit which will be recognized in other countries, the statutes require that the law of the ecclesiastical courts must be applied. *De Reneville's* case [25] is distinguishable, for no ecclesiastical court would have assumed jurisdiction there, since the respondent was not within the jurisdiction.

---

[21] [1944] P. 10.

[22] [1944] P. 95.

[23] (1821) 3 Phillim. 597.

[24] [1948] A.C. 274, 285; 64 T.L.R. 8; [1947] 2 All E.R. 886.

[25] [1948] P. 100.

[HODSON L.J. In that event the ecclesiastical courts would not have heard *White* (*orse. Bennett*) v. *White* [26]—a void marriage where the respondent was in Australia; but it is clearly difficult to see how all these decisions can be fitted in.]

It is not easy to justify the exercise of jurisdiction in *White's* case.[26] It must have been on grounds of convenience, and the words "as nearly as may be" do provide a loophole; otherwise in cases like *White* v. *White* [26] grave injustices might occur. The only cases in which the ecclesiastical courts allowed service on a party outside the jurisdiction was where the respondent had left the diocese in order to avoid the proceedings.

The jurisdiction in divorce is derived from statute, and the additional jurisdiction in nullity on the new grounds given by section 8 of the Matrimonial Causes Act, 1950, placed those new grounds on the same basis as those known to the ecclesiastical courts; there is no reason to distinguish, for instance, between the old ground of incapacity and the new ground of wilful refusal to consummate; and Viscount Jowitt L.C. in *Baxter's* case [27] treated those additional grounds as proper to be dealt with as the ecclesiastical courts would have dealt with them.

Though it is conceded that in *Armytage* v. *Armytage* [28] it was made clear that the court's decision had no effect on status, nevertheless section 22 of the Act of 1857 must be given effect, even if the result now is a change in status. But it is submitted that the decree of the ecclesiastical courts must also have affected status, for once it had been given the parties were free to marry again.

It is not conceded that there is any analogy between a decree of dissolution of marriage and a decree of nullity for wilful refusal, for a voidable marriage is voidable ab initio, and there is a great difference between a decree of dissolution and a declaration of nullity.

This court could not assume jurisdiction only on the ground of convenience unless the case falls within the limits of the jurisdiction which the old courts would have assumed. The suit for incapacity was directly within their jurisdiction, as preserved by the Act of 1857 and perpetuated in later enactments, and that jurisdiction should be exercised in the present case.

[26] [1937] P. 111; 53 T.L.R. 442; [1937] 1 All E.R. 708.

[27] [1948] A.C. 279, 285.

[28] [1898] P. 178.

Temple Q.C. in reply. *White* v. *White*[29] was justified in *De Reneville's* case.[30] It was jurisdiction taken ex misericordia and only justified in the later decision by saying that the wife had never obtained the husband's domicile because the marriage was void ab initio.

DENNING L.J. The parties in this case went through a form of marriage on November 22, 1947, while the husband was a major in the Army and his wife was employed in Cairo; and they were married in Cairo by an Army chaplain under the provisions of section 22 of the Foreign Marriage Act of 1892. It can therefore be treated in all respects as if it was a marriage made in the United Kingdom, in England, for instance, or in Scotland.

In 1954, while the parties were both living in this country, the wife filed a petition for nullity on the ground of incapacity or, alternatively, wilful refusal to consummate the marriage. The important thing to notice is that the domicile of the husband is in Scotland. It follows that, unless and until the marriage is annulled, the domicile of the wife is also in Scotland, because she takes the domicile of her husband. It is suggested that because the domicile of the parties is in Scotland the courts of England have no jurisdiction to entertain this petition. The husband has, we are told, started proceedings in Scotland for nullity on like grounds, and wishes to proceed with his case there. The issue is whether the English courts have jurisdiction. It is a matter of practical importance, because in England the wife, after a decree for nullity, can get maintenance, whereas in Scotland she cannot get anything.

The jurisdiction in cases of nullity is, in my judgment, entirely different from the jurisdiction in cases of divorce. In cases of divorce, ever since *Le Mesurier* v. *Le Mesurier*[1] in 1895, the only courts which have had jurisdiction to decree a dissolution of a marriage are the courts of the domicile; but the jurisdiction of our courts in nullity cases is different, dating from 1857, when, by section 22 of the Matrimonial Causes Act, 1857, it was said: "In all suits and proceedings, other than proceedings to dissolve "any marriage, the said court shall proceed and act and give "relief on principles and rules which in the opinion of the said "court shall be as nearly as may be conformable to the principles "and rules on which the ecclesiastical courts have heretofore "acted and given relief." That section shows plainly that the jurisdiction in nullity suits depends on the principles and rules which were observed in the ecclesiastical courts before 1857. It is true that the grounds of nullity have since been extended, but nevertheless, in my opinion, all suits for nullity, whether on the original grounds—for instance, for incapacity—or on the new grounds— for instance, for wilful refusal—are to be governed by the principles and rules which were observed in the old ecclesiastical courts.

---

[29] [1937] P. 111.

[30] [1948] P. 100, 117.

[1] [1895] A.C. 517; 11 T.L.R. 481.

It is quite clear that the ecclesiastical courts based their jurisdiction in cases of nullity on residence, not upon domicile. If the respondent, the defendant to a petition, was resident within the local jurisdiction of the court, then the court had jurisdiction to determine it. So in the present case. The husband and wife were, at the issuing of the petition, both resident in this country, and that is sufficient to give the court jurisdiction to decide the case. So much seems to me plain on the interpretation of the statutes. In addition, in *Baxter* v. *Baxter*[2] in the House of Lords in 1948 Viscount Jowitt L.C.[3] said that section 22 manifestly applied to suits for nullity on the ground of incapacity. It must also apply to suits on the new ground of wilful refusal.

That is a sufficient ground for the determination of this case, but, as there has been much difference of opinion on this matter, I must say a word about *Inverclyde* v. *Inverclyde*,[4] in which Bateson J. held that in a case of nullity on the ground of impotence the only court which had jurisdiction was the court of the domicile. The basis of his reasoning was that a case of nullity, whether for impotence or for wilful refusal, was much more like a suit for divorce than anything else; and that it should be equated, so to speak, with a suit for dissolution and be governed solely by the law of the domicile, and that the only courts which should have jurisdiction should be the courts of the domicile. He said, in a sentence: "To call it a suit for nullity "does not alter its essential and real character of a suit for "dissolution."[5]

I beg to differ from this view. Looking at the ground of wilful refusal from a legalistic standpoint, and treating marriage as a contract, the remedy of nullity does look like a remedy of divorce or dissolution, because it depends on events which occur subsequent to the marriage; but looking at it from a sensible standpoint, and having regard to the true ends of marriage, one of the principal aims of which is the procreation of children, it seems to me that the remedy falls more truly within the category of nullity. No one can call a marriage a real marriage when it has not been consummated; and this is the same, no matter whether the want of consummation is due to incapacity or to wilful refusal. Let the theologians dispute as they will, so far as the lawyers are concerned, Parliament has made it quite plain that wilful refusal and incapacity stand together as grounds of nullity and not for dissolution: and being grounds of nullity, they fall within the old ecclesiastical practice, in which the jurisdiction of the courts is founded upon residence and not upon domicile.

---

[2] [1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886.

[3] [1948] A.C. 274, 285.

[4] [1931] P. 29; 47 T.L.R. 140.

[5] [1931] P. 29, 42.

Then Mr. Temple sought to draw a distinction between a marriage which was void and a marriage which was voidable. He admitted that in marriages which were void, the courts where the parties resided had jurisdiction, but he said that in marriages that were voidable, it was only the courts of the domicile. However valid this distinction may be for some purposes, it is not valid for our present purposes. Take the case of impotence itself, which has always made a marriage voidable. The old ecclesiastical courts would certainly assume jurisdiction on the grounds of residence and not of domicile; and if they would assume jurisdiction, so should we also. Likewise with wilful refusal, which also makes a marriage voidable.

It is to be noticed that in 1944 there were two cases, *Easterbrook* v. *Easterbrook*,[6] before Hodson J., and *Hutter* v. *Hutter*,[7] before Pilcher J., in which it was held that the English courts have jurisdiction in nullity cases where both parties are resident here. In the first of those cases, a Canadian soldier married an English woman here, and it was held that although he was domiciled in some province in Canada, nevertheless the courts here had jurisdiction to determine his claim for nullity. Any other view would be most unfortunate. It would be absurd that a Canadian soldier married to an English woman should have to go to the courts of Canada to get his remedy (or, conversely, that she should) when they were both resident here. The next case was that of a United States soldier who married an English woman here. Again it was held that the courts in this country had jurisdiction even though the soldier was domiciled in one of the States of America. It is far too late in the day to say that those two cases were wrongly decided, considering that many decrees must have been given on the self-same footing, and that many people have regulated their affairs on the basis of them. It would be very wrong to suggest now that those decisions were bad, and that the people who have acted on them have been guilty of bigamy. I am clearly of opinion that those two cases were rightly decided and should be upheld: but *Inverclyde* v. *Inverclyde*[8] was wrongly decided and should be overruled.

---

[6] [1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90.

[7] [1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368.

One word more. It may be in these nullity cases that the courts of the domicile also have jurisdiction: so may the courts of the place where the marriage was celebrated[9]: but the courts where both parties reside certainly have jurisdiction.

I find myself in agreement with Willmer J. and would dismiss the appeal.

Hodson L.J. The question in this case is whether the court has jurisdiction to entertain a petition for nullity where the parties are resident in this country. The field of jurisdiction in nullity cases is a very wide one. There are a great many cases which have been discussed by judges and by professors, and it is not always easy to see whether in a given case the decision can be justified or, if it can be justified, the precise ground on which it ought to be supported. But in this case I have no doubt that the decision of the judge was right for the reasons which he gave.

I agree also with the reasoning of Pilcher J. in *Hutter* v. *Hutter*,[10] which I think put this class of case on the right footing, basing his judgment, as he did, on the ecclesiastical jurisdiction and the way in which that jurisdiction was exercised. In order to be literally accurate in saying that I agree with the judgment of Pilcher J., I ought perhaps to add that in one respect I think he was corrected (in a respect which has nothing to do with the matter under discussion) by a later decision of

---

[8] [1931] P. 29.

[9] *Note*: In *Addison* (*orse. McAllister*) v. *Addison* ([1955] N.I. 1) Lord MacDermott L.C.J., sitting in the Queen's Bench Division (Matrimonial) of the High Court of Justice of Northern Ireland, granted a decree nisi to a petitioner resident in Northern Ireland for the annulment of her marriage, celebrated in Northern Ireland in 1943, with the respondent, who was domiciled and resident in England, on the ground of his impotence or, alternatively, wilful refusal to consummate the marriage. His Lordship held that in the exercise of the jurisdiction to annul a marriage there was no ground for distinguishing between void and voidable marriages, and that as the courts of England and Ireland had long exercised jurisdiction to annul void marriages celebrated within the jurisdiction, irrespective of the domicile or residence of the parties, there was power in the court to pronounce a decree of nullity in the present case on the ground that the marriage had been celebrated in Northern Ireland.

[10] [1944] P. 95.

C. A.

1955

RAMSAY-FAIRFAX (ORSE. SCOTT-GIBSON) v. RAMSAY-FAIRFAX.

Hodson L.J.

this court in *De Reneville* v. *De Reneville*,[11] because I think he did not take the view that in the case of a voidable marriage a wife would take the domicile of her husband, whereas the contrary opinion was expressed by this court in *De Reneville*.[11] But in its main structure I agree entirely with the judgment of Pilcher J., who, after argument assisted by the Attorney-General acting on behalf of the King's Proctor, considered fully the problem under review.

I have nothing further to add except to say, as has been said many times before—for instance, by Sir William Scott in *Sinclair* v. *Sinclair* [12]—" the conclusion is carried too far when " it is said that a sentence of nullity of marriage is necessarily " and universally binding on other countries."

MORRIS L.J. I am of the same opinion. The only question which we have to decide in this appeal is whether, inasmuch as both parties were resident though not domiciled in England at the date of the petition, the court had jurisdiction to grant a decree of nullity. In my judgment, the judge came to a correct conclusion, and I agree with his judgment.

The authorities which have been cited to us show that the ecclesiastical courts entertained suits of nullity in a case where the marriage was voidable and where both parties were resident within their jurisdiction. The jurisdiction of the High Court is now founded on section 21 of the Supreme Court of Judicature (Consolidation) Act, 1925, and with that section has to be read section 32.

It is true that by section 8 of the Matrimonial Causes Act, 1950, replacing a section of the Act of 1937, there are today additional grounds for a decree of nullity of which old ecclesiastical courts had no cognizance. But I think that those are merely additional grounds for the granting of a decree of nullity by the court if the court is endowed with a jurisdiction to grant a decree of nullity. I think that there was such jurisdiction in the ecclesiastical court where the parties were resident, and I think that the effect of the statutory provisions is to give that jurisdiction to the Probate Division of the High Court.

Appeal dismissed.

Solicitors: *G. P. Voss; Lee, Ockerby, Johnson & Co.*

M. M. H.

---

[11] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.

[12] (1798) 1 Hag.Con. 294, 297.

C. A.

1955
Nov. 12, 30.

Denning,
Hodson and
Morris L.JJ.

JEFFERSON *v.* JEFFERSON.

Husband and Wife — Maintenance — High Court — Order — "£52 per "annum free of tax" — Small maintenance payment — Effect of order—Income Tax Act, 1952 (15 *&* 16 *Geo.* 5 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 205, 206.

Revenue—Income tax—" Free of tax" payments. "Free of tax."

On the making of a decree absolute in January, 1952, an order was made by a district registrar requiring the husband to pay to the wife maintenance "at the rate of £52 per annum free of tax "the said sum to be payable weekly."

For some time the husband, with the wife's consent, paid her monthly sums of £4 6s. 8d. in discharge of his obligations under the order; but in December, 1954, the wife's solicitors claimed that the proper weekly sum was the grossed-up sum of £1 plus a sum representing the income tax thereon according to the standard rate prevailing from time to time. The wife was not liable to pay tax at the full standard rate. On the refusal of the husband to vary his payments, the wife took out a judgment summons before the commissioner claiming arrears of maintenance. The commissioner upheld the wife's contention, found that the arrears amounted to £88 and made a committal order, to be suspended so long as the husband paid off the arrears at the rate of £5 per month. On appeal:—

Held (by Hodson and Morris L.JJ., Denning L.J. dissenting), (1) that the order on its ordinary construction required the payment of a grossed-up sum, which, after the deduction of income tax at the current standard rate, would amount to £52 per annum.

Burroughes v. *Abbott* [1922] 1 Ch. 86; 38 T.L.R. 167 and *Spilsbury* v. *Spofforth* [1937] 4 All E.R. 487; 21 T.C. 247 applied.

(2) That the provisions regarding small maintenance payments in sections 205 and 206 of the Income Tax Act, 1952,[1] did not have

---

[1] Income Tax Act, 1952 (reproducing provisions of the Finance Act, 1944), s. 205: "(1) In this Chapter, "'small maintenance payments' "means payments under an order "made by a court in the United "Kingdom—(*a*) to or for the benefit "of a woman for her maintenance; ". . . being payments which—(i) are "for the time being required by the "order (whether as originally made "or as varied) to be made weekly "at a rate not exceeding the amount "per week specified in subsection (3) "of this section; and (ii) would, "apart from this section, fall within "Chapter I of this Part of this Act "(which provides for the deduction "of tax from interest, annuities and "other annual payments), and 'small "'maintenance order' means an "order providing for the making of "small maintenance payments. (3) "The amount referred to in paragraph (i) of subsection (1) of this "section is—(*a*) in the case of payments to or for the benefit of a "woman for her maintenance, five "pounds if the payments are payments pursuant to an order made in "accordance with paragraph (*c*) of "section five of the Summary Jurisdiction (Married Women) Act, "1895, and otherwise two pounds; ". . ."

S. 206: "(1) Notwithstanding anything in Chapter I of this Part of "this Act, small maintenance payments shall be made without deduction of tax. (2) Any sums paid in "or towards the discharge of a small "maintenance payment shall be the effect of making the payment of £1 per week a gross sum, but enabled the husband to deduct the grossed-up payment from his total assessable income, such payment being taxable in the hands of the wife.

(3) That the reasoning in *In re Pettit* [1922] 2 Ch. 765; 38 T.L.R. 787 (which requires that a "tax-free" annuitant under a trust must account to the trustees for any difference between the sum representing the standard rate of income tax included in the annuity received by him and the amount actually paid by him to the Revenue in respect of such annuity) had no application to sums payable under a maintenance order.

Per totam curiam. The expression "free of tax" ought never to appear in a maintenance order, whether concerned with a small maintenance payment or otherwise.

Per Denning L.J., dissenting. The appropriate sum payable under the order would be £1 plus an unknown amount representing the wife's actual liability for income tax thereon. A judgment summons must be for a sum certain; the sum payable by the husband was uncertain, so that no judgment summons should have been issued against him; the wife's solicitors should have applied to the registrar to vary his order by directing a weekly payment of £1 3s., or whatever the appropriate sum should be. The reasoning in *In re Pettit* (supra) is applicable to maintenance.

APPEAL from Judge Tucker, sitting as a special commissioner.

A decree nisi dissolving the marriage of the parties was made absolute on January 4, 1952, and on that date an order was made by a district registrar requiring the respondent husband to pay to the petitioner wife maintenance "at the rate of £52 per "annum free of tax the said sum to be payable weekly." The husband, by arrangement with the wife's solicitors, discharged his obligations by giving to his bankers an order for a monthly payment of £4 6s. 8d. to be made to the wife; this was accepted for a time by the wife, who received a refund of income tax from the Inland Revenue authorities amounting to some £31 in respect of 14 months' payments in the years 1952–1953. The wife, who

---

"chargeable under Case III of "Schedule D, but the tax shall be "computed in all cases on the payments falling due in the year of "assessment, so far as paid in that "or in any other year. (3) A claimant shall be entitled, in computing "his total income for any year of "assessment for any of the purposes "of this Act, to deduct sums paid by "him in or towards the discharge "of any small maintenance payments "which fall due in that year, and "effect shall be given to this deduction by reducing any assessment "made on him or by repayment, as "the case may require, and for the "purposes of proviso (*b*) to subsection "(1) of section 101 of this Act and "of section 221 of this Act (which "provide that relief is not to be "given in respect of charges on income) any amount which can be "deducted under this subsection in "computing the total income of a "person shall be treated as if it were "income the tax on which that person "is entitled to charge against another "person."

was earning £4 15s. per week, was not liable for income tax at the full standard rate.

The Inland Revenue authorities having refused to make any further refunds to the wife, her solicitors claimed, in December, 1954, that in order to comply with the order the husband ought to pay £1 16s. 4d. weekly, representing £1 per week grossed up so as to include tax at the standard rate of 9s., and requested him to increase his standing order to £7 17s. 7d. per month. On the husband's refusal to comply, the wife took out a judgment summons claiming an extra 16s. 4d. per week up to April 5, 1955 (while the standard rate of tax was 9s.), and for some further weeks 14s. 9d. per week, as the standard rate had been reduced to 8s. 6d. The judge upheld the contention of the wife that the sum payable was a sum grossed up to include income tax at the current standard rate, found that the arrears amounted to £88 12s. 5d. and made a committal order to be suspended while the husband paid off the arrears at the rate of £5 per month.

The husband appealed.

Felix Taylor for the husband. The proceedings below were misconceived; there never have been any arrears de facto, or anything on which a judgment summons could operate. If the wife was dissatisfied, her proper course should have been to apply to the registrar to vary the order. The payment ordered falls within the class of "small maintenance payments" to which sections 205 to 207 of the Income Tax Act, 1952, apply; the commissioner so found, but failed to apply those sections. Their effect is to make the expression "free of tax" meaningless and superfluous when applied to a small maintenance payment, from which the husband is statutorily prohibited from deducting tax. The order should be construed as if the words "free of tax" were not there. The commissioner relied on *J.* v. *J.*,[2] but that case is not applicable to a small maintenance payment.

J. D. F. Moylan for the wife. The meaning of an order for the payment of "£*x* free of tax" is well settled; it means such a gross sum as after the deduction of income tax at the standard rate will leave £*x* in the hands of the recipient: *Burroughes* v. *Abbott*[3]; *Spilsbury* v. *Spofforth*[4]; *Inland Revenue Commissioners* v. *Cook*[5]; *Stokes* v. *Bennett*.[6]

---

[2] [1955] P. 215; [1955] 2 All E.R. 617.

[3] [1922] 1 Ch. 86; 38 T.L.R. 167.

[4] [1937] 4 All E.R. 487; 21 T.C. 247.

[5] [1946] A.C. 1; [1945] 2 All E.R. 377.

[6] [1953] Ch. 566; [1953] 2 All E.R. 313.

Payments made by one person to another, other than small maintenance payments, are governed by sections 169 and 170 of the Act. Their effect is, that if the payment is made out of income already brought into charge for tax, the payer may deduct tax when making the payment; if it is made out of income which has not been brought into charge for tax, the payer must deduct tax and pay it to the Revenue. In the case of a small maintenance payment, the sum ordered must be paid in full without deduction and, so far as the Revenue is concerned, it is a proper deduction from the taxable income of the payer and is taxable in the hands of the payee. The effect of sections 205 and 206 is not to vary the usual and established construction of such an order, but to require a grossed-up sum to be paid and paid without deduction.

[DENNING L.J. The wife's earnings and liability to tax are very small; if you are right, it means that she will receive much more than the £52 ordered to be paid.]

The principle in *In re Pettit*[7] has never been applied in maintenance cases; no husband has ever succeeded in recovering back tax overpayments from the wife.

[DENNING L.J. It is difficult to think that the registrar intended to give £1 16s. weekly to the wife, when she is not liable to the full rate of tax or anything like it.]

Suppose that the husband pays only £1 net; under section 206 (2) that sum will be taxable in the hands of the wife, so that she will get less than £1 per week, and that plainly is not the intention of the order.

If the payee has only a small income, it may well be that she will in the end receive rather more than the net sum: see *Inland Revenue Commissioners* v. *Cook*.[8] The words "free of tax" have now a settled meaning, which cannot be varied by a consideration of particular circumstances.

Cur. adv. vult.

Nov. 30. The following judgments were read.

DENNING L.J. The parties were husband and wife until they were divorced by a decree absolute dated January 4, 1952. I will for convenience still speak of them as "the husband" and "the wife." Upon the decree being made absolute, the Divorce Court made an order for maintenance "at and after "the rate of £52 per annum free of tax, the said sum to be

---

[7] [1922] 2 Ch. 765; 38 T.L.R. 787.

[8] [1946] A.C. 1.

"payable weekly." The wife's solicitors suggested that the simplest means of payment would be for the husband to give a standing order to his bankers to pay £4 6s. 8d. per calendar month into the wife's account. That is, of course, equivalent to £1 a week. The husband gave the standing order as they asked, and ever since the money has been paid regularly into the wife's account.

Three years later, in December, 1954, the wife's solicitors claimed that, in order to comply with the order, the husband ought to pay to the wife not the £1 a week (for which they had originally asked) but £1 16s. 4d. a week. The reason was because they said that "£1 free of tax" in the order meant "£1 grossed up so as to include tax at the standard rate," which was then 9s. in the £, making £1 16s. 4d. a week. Accordingly they suggested that the husband should increase the standing order from £4 6s. 8d. to £7 17s. 7d. a month. The husband refused to do this. The wife's solicitors then took out a judgment summons claiming that the husband ought from the beginning to have paid to the wife £1 16s. 4d. a week until April 5, 1955 (whilst the standard rate of tax was 9s.), and thereafter £1 14s. 9d. a week, because the standard rate was then reduced to 8s. 6d. The judge has upheld the wife's contention and has held that the husband has made default in payment of £88 12s. 5d., and he has ordered that the husband is to be committed to prison unless he pays off that sum at the rate of £5 a month in addition to the current payments. The husband appeals to this court.

The first thing to notice is that, whatever be the correct figure, the weekly sum is under £2 and comes within the small maintenance provisions of the Income Tax Act, 1952, ss. 205 to 207. As such, the husband is not entitled to deduct the tax at source. He must pay his wife the proper weekly sum in full, and leave her to pay her own tax direct to the Revenue. Her tax will not, however, be calculated at the standard rate of 9s. (now 8s. 6d.) in the £. The wife goes out to work and earns £4 to £5 a week. She is, of course, taxed on her earnings, but the tax does not come to very much because she is entitled to her personal allowance and other reliefs, and even on the balance she is liable only to the reduced rate of tax, not the full rate. If the husband is liable to pay her £1 16s. 4d. a week (as the judge says he is) she would have to pay tax on it, but this tax would be only a few shillings a week, say 5s., and she would have the balance, say £1 11s. 4d. a week, in her pocket free of tax, whereas all that she is entitled to under the order is £1 free of tax. This leads me to think that there must be something wrong with the judge's order.

In order to determine this case, it is useful to consider the effect of a large order or agreement for maintenance, say £5 10s. a week free of tax. Such a sum comes within sections 169 and 170 of the Income Tax Act, 1952, and the husband is entitled or bound to deduct tax at the source at the standard rate of 9s. (now 8s. 6d.) in the £. In such a situation, the law is clear. If an order or agreement is made for "£5 10s. a week free of "tax," this means that the husband must pay his wife such a sum as will, after payment of her tax on it, leave her with £5 10s. a week clear to spend for her personal behoof. See *Inland Revenue Commissioners* v. *Cook*.[1] In order to arrive at the figure when the standard rate of tax is 9s. in the £, the husband must, in the first instance, put on one side a gross sum of £10. He must pay £5 10s. of it to his wife, and £4 10s. to the Revenue, being the tax on £10 at 9s. in the £. That satisfies the husband's obligations under the Income Tax Acts.

But it must be remembered that the income which the wife receives is her own income, and the tax has been paid by him on her account. If she is earning little or nothing, so that she is not liable to pay as much as 9s. in the £, then she can recover from the Revenue the amount that has been overpaid on her account: see *Inland Revenue Commissioners* v. *Cook*[2]; but she ought, I think, straightway to pay this amount over to her husband. The reason is because it is then clear that the husband has paid more tax on her account than he was bound to pay. He was bound to see that she got £5 10s. clear to spend for her own personal behoof, no more and no less. He does this by paying all the tax to which she is liable. When she gets a repayment on the ground that she was not liable, she ought to pay it over to him. The reasoning in *In re Pettit*[3] and all the cases which follow it, such as *Inland Revenue Commissioners* v. *Cook*,[4] and *In re Lyons*,[5] applies to an order of the court for maintenance just as it does to a bequest of an annuity.

I understand that my brothers think that the wife would not be bound to pay anything back. Assume this to be so, nevertheless it does not alter the fact that all that the husband has to pay her in cash is £5 10s. Test it by asking what was to happen if in such a case the husband does not pay the wife £5 10s., nor the Revenue the £4 10s. What can the wife claim against her husband by action at law? Can she sue him for the gross sum of £10, or only the net sum of £5 10s.? She can, I think, only sue him for the net sum of £5 10s. If she were to sue for the gross sum of £10, she would be met by the defence that the husband was entitled or bound to deduct the £4 10s. before paying her; see sections 169 and 170 of the Income Tax Act, 1952, and *Stokes* v. *Bennett* [6] by Upjohn J. The wife gets her £5 10s., and leaves the Revenue to collect the £4 10s. from her husband. If the husband did not pay, the wife could issue a judgment summons for only £5 10s., not for £10.

---

[1] [1946] A.C. 1; [1945] 2 All E.R. 377.

[2] Ibid.

[3] [1922] 2 Ch. 765; 38 T.L.R. 787.

[4] [1946] A.C. 1.

[5] [1952] Ch. 129; [1951] 2 T.L.R. 1256 [1952] 1 All E.R. 34.

Such being the law in connexion with large money payments, what is the position with small money payments which come under the small maintenance provisions? Sections 205 to 207 make it clear that the husband is not allowed to deduct any tax at source, nor to pay any tax to the Revenue on account of his wife. He must pay her the full amount to which she is entitled, and leave her to pay the tax on it herself. In these circumstances no court ought to order a small money payment "free "of tax." The court ought to order a stated cash sum; but in assessing the figure, it should remember that the wife may have to pay tax on it, the amount of tax depending on her circumstances. That is the proper course in the case of large payments; see *J.* v. *J.*[7] All the more so in the case of small money payments. We are faced now with an order which has been improperly made for £1 free of tax. I take it that by this order the registrar intended that the wife should receive £1 a week clear to spend for her personal behoof, no more and no less. In order to achieve that result, the registrar should have ordered £1 3s., or whatever the appropriate sum should be, so that after she had paid her tax, she would be left with £1 in hand. He has not, however, made such an order.

What, then, is to be done? I think that the wife's solicitors ought to have gone back to the registrar and asked him to vary the order so as to bring it in accord with the law, and to give effect to his intentions, whatever they were. That is indeed what her solicitors originally intended to do, but they seem to have changed their minds. They issued a judgment summons against the husband on the footing that he ought to have paid £1 16s. 4d. a week to the wife. That was a mistake. The order for maintenance did not say that the husband was to pay £1 16s. 4d. to the wife. It said £1 free of tax. The appropriate sum would be £1 plus an unknown amount which the husband had no sure means of calculating. She might perhaps have brought an action for the amount, but not a judgment summons. A judgment summons must be for a sum certain. It cannot be based on an unknown quantity. The only certain figure was the £1 a week which the husband had paid. No judgment summons should, therefore, have been issued against him.

---

[6] [1953] Ch. 566; [1953] 2 All E.R. 313.

[7] [1955] P. 215; [1955] 2 All E.R. 617.

I think the appeal should be allowed, and the judgment summons dismissed.

HODSON L.J. This is an appeal from a suspended committal order made by His Honour Judge Tucker in respect of a judgment debt of £89 0s. 4d., being arrears of maintenance due under an order of the Divorce Court dated January 4, 1952. The order which was made " in invitum " was as follows: " It is " ordered that Frederick Jefferson the respondent do pay or " cause to be paid to Edith Jefferson the petitioner during their " joint lives and until further order as from the date on which " the decree nisi herein was made absolute, to wit the 4th day " of January, 1952, maintenance at and after the rate of £52 " per annum free of tax the said sum to be payable weekly."

This is not the ordinary case of an order made upon a judgment summons against a recalcitrant debtor, seeing that there was a bona fide dispute between the parties as to the amount due, but it appears to have been thought that procedure by way of such a summons was the cheapest and most convenient way of deciding the question at issue between the parties. Indeed, if the order was enforceable as a judgment, as I think, it was reasonable for the petitioner to take the course which she did.

The question may be shortly stated: Do the words " £52 per " annum free of tax " bear the construction contended for by the petitioner; that is to say, are they equivalent to " such a " sum as after deduction of income tax at the standard rate for " the time being will leave £52 a year "; or do they mean, as the respondent contends, that if and so long as he pays £52 a year to the petitioner without making any deduction for tax (as he has done) he complies with the order? The judge decided

C. A.
1955

JEFFERSON
v.
JEFFERSON.

Hodson L.J.

the question in favour of the petitioner, and the respondent has appealed.

The accepted construction of this form of order is, I think, that contended for by the petitioner. This is shown by *Burroughes* v. *Abbott*,[8] a decision of P. O. Lawrence J., which was cited and tacitly approved in the Court of Appeal in *Whiteside* v. *Whiteside*.[9] Sir Raymond Evershed M.R. there said of Lawrence J.'s decision[10]: "That was a case of an order "made by the Divorce Court which, though expressed to be that "the husband should pay x pounds per annum free of tax, was "held to mean and intend that by whatever form the order was "implemented the obligation should be to pay such a sum as, "after deduction of tax, would leave x pounds." In *Burroughes* v. *Abbott*[11] an order had been made to secure maintenance "free of tax," and the deed drawn in pursuance of the order was rectified by the court so as to provide for the payment of such a sum in every year as, after the deduction of the tax for the time being payable in respect thereof, would leave a clear sum. To the same effect is the decision of Upjohn J. in *Stokes* v. *Bennett*.[12]

There is a possible alternative construction of the order which I would mention, namely, that it confers on the petitioner freedom from the tax which would otherwise be payable by her rather than freedom from tax at the standard rate. This last construction would no doubt have carried out the intention of Sir Henry Duke P. as expressed in *Dayrell-Steyning* v. *Dayrell-Steyning*,[13] and corresponds in effect with the construction placed on the provision for payment of an amount free of tax out of a trust fund by Romer J. in *In re Pettit*,[14] a decision which has been followed in similar cases up to the present time. This construction provides for a fixed increase in spendable income after an annuitant's liability to income tax has been satisfied.

Dayrell-Steyning's case[15] has not, however, been followed, and the construction indicated thereby was rejected by Finlay J. in *Spilsbury* v. *Spofforth*.[16] There the respondent to the appeal had obtained a decree absolute of divorce and an order for the payment of maintenance at the rate of £120 per annum payable monthly free of tax. At the end of the tax year she obtained a certificate that tax had been deducted, the amount on the certificate being arrived at by grossing up the net payments of £10 a month. She claimed repayment of the tax. The payments had been allowed as deductions against the income of the divorced husband as a charge on his income. It was held that she was entitled to the repayment claimed, and effect was not given to *Dayrell-Steyning's* case.[17] *In re Pettit*[18] was distinguished, as I understand it, because the payments to the wife were charges upon the husband's income and deductible accordingly; compare also *Wallis* v. *Wallis*.[19] The matter is, I think, correctly stated in Rayden on Divorce, 6th ed., at p. 563: "An "order in these terms (i.e., free of tax) requires payment of such "a gross sum as after being taxed at the full standard rate will "amount to the named sum." In a footnote on page 566 it is stated, also I think correctly, that: "It is otherwise in the case "of amounts paid free of tax out of a trust fund." Reference is there made to *In re Kingcome*[20] a decision of Bennett J. in which *In re Pettit*[21] was applied. In my opinion, therefore, the order must in the first instance be construed in the way contended for by the petitioner.

---

[8] [1922] 1 Ch. 86; 38 T.L.R. 167.

[9] [1950] Ch. 65; 66 T.L.R. (Pt. 1) 126; [1949] 2 All E.R. 913.

[10] [1950] Ch. 65, 72.

[11] [1922] 1 Ch. 86.

[12] [1953] Ch. 566, 571.

[13] [1922] P. 280; 38 T.L.R. 898.

[14] [1922] 2 Ch. 765, 768.

[15] [1922] P. 280.

[16] [1937] 4 All E.R. 487; 21 T.C. 247.

The appellant contends that as the order with which we are concerned is a small maintenance payment within the meaning of the Finance Acts, now governed by sections 205, 206 and 207 of the Income Tax Act, 1952, the order should be construed as if it were an order to pay a gross sum of £52 a year. I cannot accept that these provisions have any such effect.

[His Lordship read section 205 (1) and (3) (*a*) and section 206, and continued:] Section 207 deals with the duty of the court to give information to the Commissioners of Inland Revenue as to small maintenance orders. It is clear that this is an order for a small maintenance payment within the meaning of section 205.

These sections provide a code which was introduced by the Finance Act, 1944, to avoid cases where the husband of moderate means might be ordered in effect to pay tax at the full rate, which would be reclaimed subsequently by his wife. In this way, labour and circuity can in many cases be avoided. Were it not for the small maintenance payment provisions, section 169 of the

---

[17] [1922] P. 280.
[18] [1922] 2 Ch. 765.
[19] [1941] P. 69; 57 T.L.R. 523; [1941] 2 All E.R. 291.
[20] [1936] Ch. 566; 52 T.L.R. 268; [1936] 1 All E.R. 173.
[21] [1922] 2 Ch. 765.

Income Tax Act, 1952, would apply to this case; and the respondent would have had to treat the sum named in the order as grossed up by adding thereto the appropriate tax. He would then be entitled, in making the payments out of profits and gains already taxed, to deduct the tax on making the payments to the petitioner. In my opinion the machinery provided by the Act for small maintenance payments has no effect on the construction of the order.

Reliance was placed by the respondent on section 206 (1) under which small payments have to be made without deduction of tax. This does not mean that the order containing the words free of tax is to be construed as if those words did not appear. It is first necessary to ascertain what is the gross sum before giving effect to the section. Thus the sum payable is in this case not £1 a week but £1 16s. 4d., from which the section demands that no deduction of tax is to be made.

The practical effect of the small maintenance payment machinery is simply that the husband is entitled to deduct the gross payment from his total assessable income, and the money comes into the hands of the wife as taxable income in her hands.

It is quite true that the actual amount by which the wife may benefit from the order varies with the amount of tax which she is liable to suffer, but this is a feature common to all orders where income tax is in question.

I can see no justification for treating the machinery of small maintenance payments as a reason for construing the order in such a way that the £52 is regarded as a gross sum. It would not, in all cases, lead to a fair result, for if the £52 is to be treated as a gross sum, and the order is therefore complied with by the payment of £52 and no more, this means that if the wife is liable to tax she will get less than £52, for section 206 (2) will apply to any payment she may receive, and she will be assessable to tax accordingly under Schedule D, Case III. We were told that the practice in making small maintenance payments orders is to omit all reference to tax, and that this order is an anomaly. I am satisfied that the regular practice is correct, and ought to be followed in future.

In making all maintenance orders the court must necessarily consider the incidence of income tax as it falls on either or both of the parties, and must make the best assessment it can so as to leave in the hands of the recipient of payments such a sum as it thinks right. Orders are subject to variation under section 28 of the Matrimonial Causes Act, 1950, and if too much has been left in the hands of the recipient after tax adjustments have been made, application can be made for variation and a fresh order made. I express no opinion as to the prospects of success of such an application in this case. It has been contended before us on the part of the petitioner that there is no justification for the view that she is either receiving too much on the merits or more than the court intended she should have; but the figures have not been fully investigated, and in any event the matter is not for consideration on this appeal.

So far as the past is concerned the order stands, and is, in my judgment, enforceable as the commissioner found, so that the appeal should be dismissed.

MORRIS L.J. On November 22, 1951, the wife was granted a decree nisi of dissolution of marriage against the husband. The decree was made absolute on January 4, 1952. On that date an order for maintenance was made. It was in the following terms: [His Lordship stated the terms of the order and continued:] The solicitors of the parties (who may conveniently be referred to as the husband and the wife) arranged that payment should be made by monthly payments of £4 6s. 8d. per calendar month to the credit of a banking account of the wife, and the wife's solicitors asked that the husband's inspector of taxes should be informed of the order " so that the necessary adjustment is " made in his PAYE code for our client to be able to claim the " necessary repayment of tax in due course "; (see letter of January 9, 1952). The husband's solicitors wrote on January 10, 1952, and stated that they had already written a letter themselves to the appropriate inspector of taxes.

Payments were made to the petitioner of £4 6s. 8d. a month, and pursuant to the intention expressed in January, 1952, the wife made a successful claim for the recovery by her of tax paid by the husband referable to the maintenance payments. In 1954 certain difficulties were experienced by the husband, whose solicitors accordingly wrote on September 7, 1954, to the wife's solicitors.

[His Lordship read certain correspondence passing between the parties' solicitors and the inspector of taxes; from which it appeared that the solicitors took opposite views, while the inspector expressed the view that the matter should be referred to the court if the parties could not agree, and stated that he had been in error in making a repayment to the wife and would not do so again.]

A reference to the correspondence which I have read shows how the question which is before the court has arisen. The question is as to the meaning and effect of the order of the court. As to this, the views of the parties can have no persuasive effect. But the way in which the question has arisen, and the difficulties which have been created for both parties, demonstrate how undesirable it was that the order should have been made in the form in which it was made. It seems clear also that there was an omission to have in mind the provisions relating to small maintenance payments. These provisions were introduced by the Finance Act, 1944 (see section 25), and are now contained in sections 205, 206 and 207 of the Income Tax Act, 1952. In *Wallis* v. *Wallis*[22] Lord Merriman P. pointed to the undesirability of making "tax free" orders for maintenance, and said: "since the effect of the combination of higher taxation with the "implications of a tax free order was so plainly declared by "Finlay J. in *Spilsbury* v. *Spofforth*,[22a] so far from the tax "free order being the practice of this Division, it is the rarest "possible thing for a registrar or a judge to make it." But since an order of the court was made in the terms recited above, it becomes necessary to decide what is its meaning and effect. In my view, the question can be approached by considering first what would be the position apart from the statutory provisions relating to small maintenance payments, and secondly, what is the consequence of the application of those provisions.

We are not concerned to decide whether any and what adjustments in the income tax position of either party may have to be made. In the period down to April, 1953, the wife received payment from her husband of £1 per week, and claimed and received from the Inland Revenue a sum of money by way of repayment of tax paid by her husband. The claim that she now makes is limited to the period from April 5, 1953, to May 13, 1955, which was presumably the date of the summons. Allowing for tax at 9s. in the pound, the gross sum required to produce £1 would be £1 16s. 4d.; at 8s. 6d. in the pound (the rate as from April 5, 1955) the gross sum would be £1 14s. 9d. The arrears of £88 12s. 5d. represent two years at 16s. 4d. per week, and five weeks at 14s. 9d. per week.

The operative words of the order provide that the maintenance is to be "at and after the rate of £52 per annum free of tax the "said sum to be payable weekly." As a matter of construction, I think that "the said sum" probably refers to the stated sum of £52. But "the said sum" might be and could be the gross sum denoted by the phrase "maintenance at and after the rate "of £52 per annum free of tax." I consider that it would be an unnatural construction if the result were that the wife should receive £52, and should then be possibly liable to pay tax on the £52. The benefit accruing to the wife under the order is that her husband must "pay or cause to be paid" to her maintenance which is "at and after the rate of £52 per annum free of tax." In order to pay her "at the rate of £52 per annum free of tax" he could, apart from any statutory provisions, pay her such gross sum as would, after deduction from it of tax at the current rate, yield the sum of £52. But statutory provisions might require him or permit him to pay the tax and to pay the net sum to his wife. As a matter of construction the words of the order might alternatively mean that payment is to be made so that, whatever the wife's tax position may be, she is to receive a clear additional sum of £52 a year.

---

[22] [1941] P. 69, 74.

[22a] [1937] 4 All E.R. 487.

But apart from the placing of a construction upon the words used, there is, I consider, a well-settled and well-recognized understanding as to the meaning and effect of an order made in the Probate Division for the payment of a sum "free of tax."

The decision in *Burroughes* v. *Abbott* [23] arose out of an order made by the Divorce Court in 1907 that Mr. Burroughes should secure by deed to be settled by one of the conveyancing counsel of the court the payment of certain sums to his wife free of income tax. The deed as drawn and made contravened certain prohibitions of the Income Tax Acts. It was held that the wife was entitled to have the deed rectified, and in the substituted form as approved by the court,[24] the wording was "such a sum "in every year . . . as after the deduction of the income tax "for the time being payable in respect thereof will leave a clear "sum of . . ." The words "income tax for the time being "payable in respect thereof" must, I think, denote the current or standard rate of income tax. No disapproval of the result in *Burroughes* v. *Abbott* [25] was expressed when that case was considered by this court in *Whiteside* v. *Whiteside*.[26]

In *Spilsbury* v. *Spofforth* [27] an order had been made in the Divorce Court in favour of a wife for maintenance "at and after "the rate of £120 per annum (free of tax) the said sum to be "payable monthly." At the end of the tax year she obtained from her husband a certificate that tax had been deducted by him from an amount arrived at by grossing up the net payments of £10 per month, and she claimed repayment of the tax on the basis that she had suffered tax by deduction. The payments had, in fact, been allowed as deductions against the income of the husband, and had been treated as a charge on his income. The wife was held entitled to receive repayment of the tax which had been deducted. Finlay J., in the course of his judgment, said [28]: "It is an order of the court that she is to have £120 "free of tax. In order to carry out that intention of the "court, it is, I think, necessary that her present claim should "succeed. The commissioners have decided that it does succeed, "and I agree with them, and in agreeing with them, also on the "admission of the Attorney-General, I think that, quite clearly, "we are carrying out what must have been the intention of those "who made the order."

---

[23] [1922] 1 Ch. 86.

[24] Ibid. 99.

[25] Ibid.

[26] [1950] Ch. 65.

[27] [1937] 4 All E.R. 487.

It may be noted that although Finlay J. mentioned in his judgment that his attention had been called to the case of *In re Pettit, Le Fevre* v. *Pettit*,[29] there was no suggestion made in the case that the wife would have to pay over to the husband the tax that she recovered. Indeed, it is difficult to see how the husband could assert such a claim, since he had been given relief in respect of the payments, the maintenance being treated as a charge upon his income, and allowed as a deduction in arriving at his income tax liability; the certificate that he gave showed that he had "grossed up" the net payment of £120 per annum, and paid tax on the grossed-up figure.

That there is a well-settled understanding as to the meaning and effect of an order made in the Divorce Division for the payment of a sum by way of maintenance "free of tax" is illustrated by the judgment of Lord Merriman P. in *Wallis* v. *Wallis*.[30] The President, if I may say so, makes the matter very clear; he said: "I refer to the decision of Finlay J. in "*Spilsbury* v. *Spofforth*.[31] That case—which, I think, only "declared the law as it was known to be, but applied it more "particularly to maintenance orders of this character—decided "that when a wife has obtained a maintenance order declared "to be free of tax, she alone can recover income tax overpaid "in respect of payments under the order, and recover it on "her own behalf. To put it into practical form, on an order "such as that with which we are dealing here, with tax at the

---

[28] [1937] 4 All E.R. 487, 489.

[29] [1922] 2 Ch. 765.

[30] [1941] P. 69, 73.

[31] [1937] 4 All E.R. 487.

"rate of 10s. in the £, the payment being made out of income "brought into charge to tax, the husband has to pay the tax "on £4 of income, that is, £2 of tax, to leave a net sum of £2 "for the wife. If the wife has no separate income, and has not "already exhausted her reliefs under the Income Tax Acts she "can demand from the revenue authorities repayment of the tax "as tax overpaid on her income, as, indeed, the annuity is, so "that she both receives the £2 net and recovers the tax thereon "which the husband has had to pay. The unfortunate husband "suffers all the detriment. Whether or not that was recognized "before it was so plainly declared by Finlay J., it has been "clearly appreciated in this Division since his decision and, "while *Dayrell-Steyning* v. *Dayrell-Steyning*,[32] laid down what "Sir Henry Duke P. thought would be the proper practice in "this Division in the circumstances prevailing in 1922, it has to "my knowledge ceased to govern the practice of this Division "for some years past."

In *Stokes* v. *Bennett* [33] the wife obtained against her husband an order for maintenance "at and after the rate of £22 per month "free of tax the said sum to be payable monthly." Upjohn J., in his judgment, said: "Both sides agree, however, that "having regard to *Spilsbury* v. *Spofforth* [34] and the earlier case "of *Burroughes* v. *Abbott*,[35] an order in that form is to be "construed as an order to pay a gross sum of such amount as "after deducting income tax for the time being payable in respect "thereof will leave the clear monthly sum of £22."

The matter was neatly, and as I think accurately, summarized in the argument in that case of counsel for the Crown when it was said that: "The net sum of £22 is the yardstick "used to measure the gross sum ordered by the Divorce "Division."

In *J.* v. *J.*,[36] a case in this court, not being one in reference to a small maintenance payment, Hodson L.J. said: "The words "'free of tax' attached to a net figure, or 'less tax' attached "to a gross figure have no material effect, since the result in "each case is to order a gross sum of which part must be paid "to the payee and part to the revenue."

I reach the conclusion, therefore, that in the present case the order of the court was an order upon the husband to pay such gross sum in every year as, after the deduction of income

---

[32] [1922] P. 280.

[33] [1953] Ch. 566, 571.

[34] [1937] 4 All E.R. 487.

[35] [1922] 1 Ch. 86.

[36] [1955] P. 215, 246.

C. A.
1955

JEFFERSON
v.
JEFFERSON.

Morris L.J.

tax at the current standard rate, would leave the clear sum of £52 a year.

What, then, is the effect of the provisions of section 206 of the Income Tax Act, 1952? It is provided by subsection (1) as follows: "Notwithstanding anything in Chapter 1 of this Part "of this Act, small maintenance payments shall be made without "deduction of tax." The result is, that as the gross sum is in this case under £2, the husband must not deduct tax, but must pay the gross sum over to his wife. How does the matter thereafter stand on the wife's part and on the husband's part? As to the wife, the position is governed by section 206 (2), which provides: "Any sums paid in or towards the discharge of a "small maintenance payment shall be chargeable under Case III "of Schedule D, but the tax shall be computed in all cases on "the payments falling due in the year of assessment, so far as "paid in that or in any other year."

As to the husband, the position is governed by section 206 (3), which provides: "A claimant shall be entitled, in computing his "total income for any year of assessment for any of the purposes "of this Act, to deduct sums paid by him in or towards the "discharge of any small maintenance payments which fall due "in that year, and effect shall be given to this deduction by "reducing any assessment made on him or by repayment, as "the case may require, and for the purposes of proviso (*b*) to "subsection (1) of section 101 of this Act and of section 221 of "this Act (which provide that relief is not to be given in respect "of charges on income) any amount which can be deducted under "this subsection in computing the total income of a person shall "be treated as if it were income the tax on which that person "is entitled to charge against another person."

The liability of the husband was fixed by the order of the court, and, in my judgment, authority shows that the court imposed upon the husband a liability to pay such sum as after the deduction of income tax at the current standard rate would leave the clear sum of £52 a year. The sum for which the husband was made liable is a sum that is within the statutory definition of a small maintenance payment. The provisions of sections 205, 206, 207 of the Income Tax Act, 1952, do not have any bearing upon the meaning and effect of the order which the court made in this case, but they bring about the result that the husband may not deduct tax. He must pay to the wife the sum which the order of the court denotes. That sum is assessable for tax in the wife's hands. The husband can deduct the amount of it from his total income so as to arrive at the figure of his income in reference to which his tax liability will be assessed.

The result of this is, that there is, in my view, no room for an application of the principle laid down in *In re Pettit.*[37] In that case a testator had given an annuity free of income tax. The annuitant was able, because of reliefs that were applicable, to obtain a refund of income tax paid in excess of the amount properly payable by the annuitant. It was held that the trustees of the will, for the benefit of the residuary estate, were entitled to such proportion of the tax repaid as the annuity bore to the total income of the annuitant. In that case the annuity was paid out of income that had already been brought into charge to tax, the tax having been deducted at source before the income was received by the trustees. Romer J. pointed out the effect of the provision that an annuity of £1,000 " free of duty and " income tax " was to be paid. He said[38]: " In the year 1918– " 1919, for instance, when the ordinary rate of income tax was " 6s. in the £, the trustees would have had in the first instance " to set aside £1,428 11s. 5d. and to pay £428 11s. 5d. to the " revenue and the balance to the annuitant. But this sum might " in the end prove to be too little or too much. If the annuitant " were liable to pay super tax it would be too little and the proper " proportion of her super tax referable to her annuity would, " when ascertained, have to be paid to her by the trustees and " would so go to reduce the income payable to the residuary " legatees."

It seemed only right that if the trustees had to pay such amount of tax as would enable the annuitant to receive £1,000. and might be liable to pay tax at more than the standard rate, that they should have any refund that might result from the fact that tax at less than the standard rate was payable. The position in the present case is, in my view, in a number of respects different. In the first place, an order for maintenance is only made after a consideration of the financial position of the parties, and with knowledge of the current rate of taxation. Secondly, the terminology used in orders for maintenance has acquired well-recognized meaning; and orders may be varied from time to time. Thirdly, in the case of small maintenance payments, there must not be any deduction of tax. Payment must be made in full: the full or gross amount of the payment is chargeable to tax in the wife's hands, and is deducted from the husband's income for the purposes of his assessment to tax.

---

[37] [1922] 2 Ch. 765.

[38] Ibid. 770.

In the result I think that the judge came to a correct conclusion. Though the husband was not recalcitrant, he had for wrong reasons refused to pay sums, the exact figures of which could be calculated, which the court had ordered him to pay. Consideration was shown to him by fixing the instalment payments of the arrears at amounts and at times which were suggested on his behalf as being convenient. In my view, the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rivington & Son for Rabnett, Conway & Co., Birmingham; Field, Roscoe & Co. for Ginn & Co., Cambridge.*

F. R. D.

1955
Dec. 2.

Sachs J.

EAVES *v.* EAVES & POWELL.

Costs—Taxation—Objection—Duty of taxing officer—Reasons to be given —Divorce—Legal aid—Barrister—Brief fee in undefended divorce— Case heard out of London—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *3rd Sch.*

Legal Aid. Barrister—Fees.

It is the duty of a taxing officer, on objection being taken to a taxation of a bill of costs, to make a full statement of all his grounds and reasons in arriving at the taxation, including a specific statement as to whether or not any of the matters complained of were considered. An omnibus statement that "the merits of the "case and all other relevant circumstances" have been taken into account results in a failure to disclose the grounds on which discretion is exercised and tends to oust the jurisdiction of the court.

On taxation in a legally aided, undefended, divorce cause in which London counsel had appeared at Bournemouth, where he was also conducting, on the same day, another undefended suit for a different solicitor, the district registrar taxed counsel's brief fee down from seven to five guineas. (No question as to conference fee arose.) On objection being taken to the taxation the registrar made his observations in the omnibus form quoted above. On a summons to review the taxation:—

Held, that, (1) according to normal practice, the appropriate fee for London counsel briefed to appear in an undefended divorce cause in a town such as Bournemouth was more than five guineas;

(2) that, as the registrar had not stated that there were any relevant facts or circumstances justifying a departure from that practice it was to be assumed that none existed and a clear inference arose that some irrelevant circumstance had been taken into consideration;

(3) that counsel's brief fee must, therefore, be adjusted to seven guineas.

Self v. *Self* [1954] P. 480; [1954] 2 All E.R. 550; *Young* v. *Young & Kohler* [1955] 1 W.L.R. 395; [1955] 1 All E.R. 796 and *Isaac* v. *Isaac* [1955] P. 333; [1955] 2 All E.R. 811 applied.

Per curiam. (1) R.S.C., Ord. 65, r. 27 (40), provides a specific method by which the court is to be informed of a registrar's reasons in making a taxation, and it is undesirable that the court should be forced to have recourse to inferences drawn from what a taxing officer has done in previous cases. It is, moreover, doubtful whether the court can, as a general rule, look at a statement aliunde as to what the registrar may have said as to his reasons.

(2) The question of the procedure, and of the incidence of liability for costs on taxation, points arising under the 3rd Schedule to the Legal Aid and Advice Act, 1949, may need review in the light of the problems which have now become evident, particularly where points of principle emerge.

SUMMONS for review of taxation of a bill of costs in a legally aided, undefended, divorce cause adjourned into open court for judgment.

The suit was heard on April 14, 1955, at Bournemouth, and was undefended. On May 26, 1955, the bill of costs was taxed by the district registrar who, on March 30, 1955, had taxed the bill which was the subject of an appeal in *Isaac* v. *Isaac* [1] (in which Collingwood J. held on July 4, 1955, that the fact that London counsel had appeared in two cases on the same day at Bournemouth was an irrelevant consideration).

In the present case (as in *Isaac* v. *Isaac* [1]), the registrar taxed counsel's brief fee down from seven guineas to five guineas. On June 1, 1955, an objection to this reduction was carried in under R.S.C., Ord. 65, r. 27 (39). That objection and the registrar's answer were in the following terms: Reasons for objections. "Counsel in this case attended the court from London and rely-"ing on the case of *Self* v. *Self* [2] feels that seven guineas is a "proper fee in this case. Counsel considers that because he had "more than one case on the same day it should not affect the "issue, as a co-respondent should not benefit by the fact of "counsel having more than one brief. Counsel therefore respect-"fully contends that each case should be allowed on its merits,

---

[1] [1955] P. 333; [1955] 2 All E.R. 811.

[2] [1954] P. 480; [1954] 2 All E.R. 550.

1955

EAVES
v.
EAVES &
POWELL.

" and that the proper and correct fee in this case should be seven " guineas." The observations of the district registrar were: " In accordance with the discretion vested in me I have fixed this " fee having regard to the merits of the case and all other relevant " circumstances."

Just before the present application was due to be heard the solicitors to the husband, upon the advice of leading counsel, wrote to the registrar on November 7, 1955, a letter calling attention to the terms of R.S.C., Ord. 65, r. 27 (40), and specifically asked him, inter alia, for the " reasons for the reduction," and for information as to what were the " other relevant circum- " stances " to which the observations referred. The registrar's reply of November 8, 1955, read: " I regret that I am unable " to assist you further in this matter. As you are aware, I gave " the matter very full consideration and read the brief and other " papers in this matter before fixing fee for counsel."

An affidavit by the costs clerk who attended on the taxation, the relevant paragraphs of which are referred to in the judgment, was placed before the court at the hearing of the summons.

Denis Robson Q.C. and *Robert Armitage*, who did not represent the petitioner at the hearing, for the petitioner.

Cur. adv. vult.

SACHS J., reading his judgment, stated the facts and the relevant portion of R.S.C., Ord. 65, r. 27 (40),[1] and continued: The main object of R.S.C., Ord. 65, r. 27 (40), is to enable an aggrieved party to ascertain what the taxing officer has or has not taken into account as being relevant factors. If he has taken into account factors which are wrong, or if he has not taken into account all the factors which should have been in his mind, an appeal lies as regards principle: normally, however, no appeal lies as to quantum. The importance of the parties being made aware of these reasons by the registrar is mentioned in *Dashwood* v. *Magniac.*[2]

It is perfectly obvious that, in a case such as the present, a taxing officer is not entitled to take cover, so to speak, under an omnibus statement that he has taken "all relevant circumstances" into account. Such a statement tends to oust the jurisdiction of the court on a review of taxation, and can only too easily result in there not being disclosed the grounds on which a discretion is exercised, despite the admonition of statutory force that those grounds must be stated.

---

[1] R.S.C., Ord. 65, r. 27 (40): " Upon such application (to review) " the taxing officer . . . if so required " by either party, . . . shall state " either in his certificate of taxation or " allocatur, or by reference to such " objection, the grounds and reasons " of his decision thereon, and any " special facts or circumstances relat- " ing thereto."

[2] [1892] W.N. 54.

This is not the first time I have observed a district registrar to state his answer to an objection in terms which, no doubt by inadvertence, were abbreviated and unduly uninformative. It should be emphasized that the duty of taxing officers when answering an objection is to make a full statement of all his "grounds and reasons" in relation to the objection as taken, a duty which may well, as in the present case, entail stating specifically whether or not the matter complained of was taken into account.

In no instance is compliance with the above duty more important than in legal aid taxations—where the remuneration of both branches of the legal profession depends so much on taxing officers, and where nothing should be done in a form which would entrench on such rights as have been given to those concerned to seek a judge's review in appropriate instances.

In the present case the formula used by the registrar is all the more to be deprecated because he refrains from dealing with the one specific point raised in the objection—as to account having been taken of the fact that counsel had more than one case on the same day. This was a point which had, in fact, been raised on this taxation by the registrar himself, as appears from matter to which I will later refer.

Taking, however, the material as it thus stands, the position is as follows: First, there is the prima facie case that, according to normal practice, the appropriate fee for counsel briefed to appear in an undefended divorce cause at a town such as Bournemouth is more than five guineas. The reasons for that being so are set out in *Self* v. *Self* [3]: and I am fortified to note that Wallington J. in *Young* v. *Young & Kohler* [4] stated that he identified himself entirely with, and fully agreed with, all the reasons there given.

Secondly, despite the registrar's duty to give information as to "any special facts or circumstances" relating to the item in issue, he has not stated that there were any, and so it is to be assumed that none exist.

---

[3] [1954] P. 480; [1954] 2 All E.R. 550.

[4] [1955] 1 W.L.R. 395; [1955] 1 All E.R. 796.

Thirdly, where something is done which, prima facie, is not normally right, and where no explanation appears as to why that course has been taken, a clear inference arises that some irrelevant circumstance has been taken into consideration.

On that footing the registrar has gone wrong in principle on this matter of counsel's fee, and it is my duty to review the taxation. This I have done, and I allow counsel's fee at the same figure as Collingwood J. in *Isaac* v. *Isaac*,[5] viz., seven guineas.

I now turn to the alternative grounds on which Mr. Robson urged that the decision be reviewed. When the attempts to get the registrar to comply with the provisions of R.S.C., Ord. 65, r. 27 (40), proved unsuccessful, an affidavit was sworn to by the costs clerk of the petitioner's solicitors, who attended the taxation of May 26, 1955. Of this, paragraph 5 reads: "The learned "district registrar asked if counsel had had more than one case "on that date and I informed him that my firm had only "instructed counsel in that one case, but he instructed his clerk "to refer to the court papers, and it appeared that another "solicitor had also instructed the same counsel on the same day "in another case."

Mr. Robson urged, not unnaturally, that, in the light of the views stated by the same registrar on March 30, 1955, in *Isaac* v. *Isaac* [5] on reducing the fee of counsel, who there held more than one brief, the inference to be drawn from the facts set out in the above paragraph 5 was that he continued wrongly to hold that view on May 26, 1955. (I have since ascertained that the application to the judge in the earlier case was filed on June 3, 1955.) When, however, it is the function of a court to review a taxation, it seems to me to be undesirable that it should have to resort to inferences of that type, and I have preferred here to act on general grounds arising from such material as is above set out before me in the present case, and to reserve the question as to whether or not, in certain circumstances, inferences may be drawn from what a taxing officer has done in other cases.

Similarly, as R.S.C., Ord. 65, r. 27 (40), provides the specific method by which this court is to be informed of a registrar's reasons, it seems doubtful whether the court can, as a general rule, look at statements aliunde as to what the registrar may have said as to his reasons (compare the reasoning in *Huddleston* v. *Furness Railway Co.*[6]). Accordingly, I merely note that paragraph 6 of the above affidavit reads: "I duly quoted to the

---

[5] [1955] P. 333; [1955] 2 All E.R. 811.

[6] (1899) 15 T.L.R. 238.

"learned district registrar the case of *Self* v. *Self*,[7] but in spite "of this he disallowed the two guineas and it appeared from "his observations that the reason was because counsel had two "cases on that date."

To have had regard to that statement might have paved the way to undesirable and unseemly conflicts of evidence between aggrieved parties and officers of the High Court acting in their judicial capacities.

The mere fact, however, that it should, quite reasonably, have been thought necessary, in the interests of those concerned, to file an affidavit of the above type underlines from another angle how essential it is that taxing officers should state fully and freely the reasons upon which they ground their decisions.

As regards the legal aid costs of this application, I order that they be taxed under the provisions of the Legal Aid and Advice Act, 1949—leave having been given by the area committee under general regulation 14 of the Legal Aid (General) Regulations, 1950, for this application to be made. I certify for one counsel and thank Mr. Robson for the assistance he has, in the interests of justice, given to the court.

There remain two further matters which call for attention. In *Self* v. *Self* [7] I referred to the difficulties which a court feels when the interests of the Legal Aid Fund are not represented on these applications. I understand some progress has been made in this matter, but the mere fact that, neither in this nor the preceding application for a review of taxation in a legal aid case,[8] was there anyone present as amicus curiae or otherwise to represent the interests of the Legal Aid Fund, shows that the problem still requires attention. Secondly, there is a further point which has before now been discussed in chambers in other cases. These applications for review can, at present, only be brought in the name of and by authority of the lay client. Not only has that client no beneficial interest in the result, but the mere fact that such an application is made often may (as in *Isaac* v. *Isaac* [9] and, I think, in the present one) adversely affect the lay client irrespective of success or failure: for technically the costs of the objection and the application under R.S.C., Ord. 65, r. 27 (41), are chargeable against his contribution—and in a marginal case (as the present) may reduce the amount paid back to the lay client by the Legal Aid Fund.

---

[7] [1954] P. 480.

[8] *Francis* v. *Francis and Dickerson*, ante, p. 87.

[9] [1955] P. 333.

1955

EAVES
v.
EAVES &
POWELL.

Sachs J.

I can do no more, in the present case, than recommend the Law Society to take such steps as it can to obtain Treasury consent to refrain from charging these costs against the contribution. The practical importance of this point is shown by the fact that in *Isaac* v. *Isaac*[9] the taxed costs of the objection and the application to Collingwood J. amounted to £23 6s. 5d.: of which the solicitor's profit costs were £19 19s. 3d., compared with his profit costs of £30 5s. 9d. for all the rest of the proceedings to decree absolute.

Turning from the present case to the general position, I would suggest that the question of the procedure, and of the incidence of liability for costs on taxation, points arising under Schedule 3 to the Legal Aid and Advice Act, 1947, may need review in the light of the problems which have now become evident. This seems particularly necessary where points of principle emerge—the determination of which is desirable for the better functioning and administration of the scheme—though I realize that the position may be met temporarily if it were made known that the Legal Aid Fund would waive its right to charge the assisted person's contribution in respect of such costs.

I turn now to the application in so far as it relates to the party and party columns of the bill. The district registrar there similarly reduced counsel's fee. On the particular facts of the present case there appears to me to be no difference between the fee to be allowed in the party and party columns and the legal aid columns. Accordingly, I adjust the fee in the former likewise to seven guineas.

Application allowed.

Solicitors: *Kinch & Richardson for Cyril Clark, Bournemouth.*

E. J.

---

[9] [1955] P. 333.

C. A.

1955
Dec. 19.

Morris and
Parker L.JJ.

ELLIOTT *v.* ELLIOTT.

Husband and Wife—Divorce—Desertion—Constructive desertion—Reasonable grounds for belief in petitioner's adultery—Statements by third party regarding petitioner to respondent not alleged to be true in fact.

On a petition for divorce by a wife on the ground (inter alia) of desertion, the husband by his answer pleaded desertion on the part of the wife, alleging that he had good grounds for living apart from her as he had reasonable grounds for believing that she had been guilty of adultery.

Among the matters pleaded as grounds for such belief was an allegation that the husband had been informed by his mother that in July, 1953 (more than a year after the parties had separated), the wife had been admitted to hospital suffering from a miscarriage, and that he had been further informed by his mother in April, 1954, that the wife was again pregnant. There was no allegation that these statements were true, or that the husband had made any inquiries about them.

On the wife's application the commissioner ordered the allegation to be struck out. On appeal:—

Held, that though a reasonable belief, induced by the wife's conduct, in her adultery could afford to the husband good cause for living apart, a mere statement by a third party imputing adultery to the wife, unaccompanied by any allegation as to its truth, or as to conduct by the wife inducing a belief in its truth, could not be pleaded as a ground of constructive desertion.

Glenister v. *Glenister* [1945] P. 30; [1945] 1 All E.R. 513 and *Beer* v. *Beer* [1948] P. 10; 63 T.L.R. 606; [1947] 2 All E.R. 711 applied.

APPEAL from Judge Charlesworth, sitting as a special commissioner.

In proceedings for divorce the petitioner, the wife, alleged by her petition that her husband, without cause, deserted her for a period of at least three years immediately preceding the presentation of the petition: she, in fact, alleged desertion from a day in September, 1951. By an amendment to her petition, not now material, she also alleged that her husband committed adultery. By his answer, the husband denied that he deserted the petitioner, and alleged that the petitioner deserted him, for a period of at least three years preceding the presentation of the answer: and he also alleged desertion from September, 1951. He set out in paragraph 5 of the answer various allegations of fact on which he relied to prove that it was not he who deserted, but his wife who deserted him. Paragraph 6 of the answer was in these terms: "*Further and in any event, in the month of July, 1953, your*
"*respondent was informed by his mother that the petitioner had*
"*been admitted to the General Hospital, Shotley Bridge, in*
"*July, 1953, suffering from a miscarriage, and in the month of*
"*April, 1954, he was further informed by his mother that the*
"*petitioner was again pregnant*, and he himself met the petitioner
"by chance during that month and she appeared to be pregnant.
"That in the premises your respondent has had good cause for
"living separate and apart from the petitioner from the month

"of July, 1953, or alternatively from the month of April, 1954, "by reason of the fact that he had reasonable grounds for "believing and did believe that the petitioner had been guilty of "adultery as hereinafter alleged." In paragraph 7 he pleaded: "That the petitioner committed adultery with a man whose name "and identity are at present unknown to your respondent on a "date between the month of November, 1952, and the month "of June, 1953"; and by paragraph 8: "That the petitioner "committed adultery with a man whose name and identity are "at present unknown to your respondent at a place at present "unknown to your respondent on a date between the month of "December, 1953, and the month of June, 1954."

The commissioner, on the wife's application, made an order striking out the portion of paragraph 6 above in italics.

The husband appealed.

K. M. McHale for the husband. The disputed words are not put forward as evidence of adultery, which would be against the hearsay rule; they are put forward as evidence of the husband's state of mind, which is a relevant consideration. His case is that as he believed, and reasonably believed, that the wife was committing acts of adultery, he was justified in remaining apart from her, and the disputed words constitute one of the grounds which induced this belief. *Glenister* v. *Glenister*[1] shows that a reasonable belief on the part of the respondent that the petitioner has been guilty of a matrimonial offence is a good ground for resisting a charge of desertion: see also *Wood* v. *Wood*[2]; *Ousey* v. *Ousey and Atkinson*[3]; *Lewis* v. *Lewis*[4]; *Forbes* v. *Forbes*,[5] and *Haswell* v. *Haswell and Sanderson.*[6]

It may be that at some future time the husband will have to verify the allegations by amending his answer, but the pleading is directed only to a particular time during which he is charged with being in desertion, and is justified as indicating his state of mind during that time. The case is not so "plain and obvious" that the allegation should be struck out: *Dixon* v. *Dixon.*[7]

Norman Lermon for the wife. This is a mere allegation that the husband was told something by somebody; there is no allegation as to its truth, or that it was later verified by inquiry. *Glenister* v. *Glenister*[8] and *Wood* v. *Wood*[9] show that it is actual conduct or misconduct on the part of the wife on which the husband must rely to justify his refusing cohabitation. In *Beer* v. *Beer*[10] Willmer J. pointed out that a husband's bona fide belief must be founded on the actual conduct of the wife if he is to be justified; such belief founded on extraneous circumstances does not justify him. If this sort of evidence is to be admitted, a husband would be able to rely on mere gossip or an anonymous letter.

---

[1] [1945] P. 30; [1945] 1 All E.R. 513.

[2] [1947] P. 103; 63 T.L.R. 450; [1947] 2 All E.R. 95.

[3] (1874) L.R. 3 P. & M. 223.

[4] [1955] 3 W.L.R. 862n.; [1955] 3 All E.R. 598.

[5] [1954] 1 W.L.R. 1526; [1954] 3 All E.R. 461.

[6] (1859) 1 Sw. & Tr. 502.

[7] [1953] P. 103, 116; [1953] 1 All E.R. 910.

McHale replied.

MORRIS L.J. This is an appeal from the order of the commissioner, Judge Charlesworth, striking out the first six lines of a paragraph in an answer in divorce proceedings. The commissioner gave leave to appeal.

[His Lordship stated the facts and continued:] So the husband is saying that he was in July, 1953, told something by his mother, namely, that the wife had been admitted to hospital in that month suffering from a miscarriage, and further, that he was told by his mother in April, 1954, that the wife was pregnant. He, by his pleading, says that he therefore had good cause for living separate and apart from the month of July, 1953, or, alternatively, from April, 1954, " by reason of the fact that " he had reasonable grounds for believing and did believe that the " petitioner had been guilty of adultery as hereinafter alleged "; that is to say, a reference to paragraphs 7 and 8. The pleading is somewhat curious, for it is to be noted that there is no allegation that it was true that the wife had been admitted to the General Hospital, Shotley Bridge, in July, 1953, suffering from a miscarriage, or that in April, 1954, she was pregnant. It is not set out in the pleading that there was any inquiry made by the husband.

The commissioner decided that that part of paragraph 6 of the answer contained in the first six lines should be struck out from the pleading. It has been argued by Mr. McHale that those lines should be allowed to remain. It is argued that the husband's state of mind was material and relevant, that these words are words which allege his state of mind, and that because he was of the state of mind which resulted from what he was told, he was justified in remaining apart from his wife. It is to be noted, as I have said, that the desertion was alleged to have begun in September of 1951. What is said is that because the husband was told certain things, he was justified, as from the time when he was told these things, in remaining apart from his wife.

---

[8] [1945] P. 30.

[9] [1947] P. 103.

[10] [1948] P. 10, 13; 63 T.L.R. 606; [1947] 2 All E.R. 711.

It seems to me that the commissioner came to a correct conclusion, and that to hold otherwise would involve departing from what I think has properly been laid down in some of the authorities, and departing (as I think) from what would be fair. If the husband is entitled to say that he was told something, that he heeded what might have been idle chatter, and, because he believed it, was entitled to remain apart from his wife, the result would be that the wife would be prejudiced even though there might have been no conduct on her part such as would lead a reasonable person to believe her guilty of adultery.

In *Glenister* v. *Glenister*[1] it was decided that "Although a "husband may not be able to prove by admissible evidence that "his wife has committed adultery, yet, if the conduct of the "wife has been such as to create in the mind of the husband "a reasonable belief that she has been guilty of a matrimonial "offence, he has a sufficient defence to proceedings based on "desertion." Lord Merriman P. said[2]: "I think that if the "wife has so conducted herself as to lead any reasonable person "to believe, until she gives some explanation, that she has "committed adultery, the husband, becoming aware of the facts "and honestly drawing that inference, and leaving his wife on "that ground, ought not to be held to have left her without "reasonable cause." I think in that passage it is to be noted that the President speaks of the wife having conducted "herself" so as to lead to a belief in the mind of a reasonable person. That is very different, in my judgment, from a state of affairs where a wife has done nothing, but where some statement is made about her which a husband may choose to believe.

In a later case, *Wood* v. *Wood*,[3] Lord Merriman P. used this phrase: "The whole point is that it is the wife's misconduct "which induces the reasonable belief on the part of the "husband." Again, the reference to the "wife's misconduct" shows that a sharp distinction must be drawn between a case where there has been some conduct or misconduct on the part of a wife, of which the husband acquires knowledge and in regard to which he forms a belief, and a case where without conduct on the part of the wife, or misconduct, there is a statement made in regard to her which may be merely idle gossip but which a husband chooses to believe.

---

[1] [1945] P. 30; [1945] 1 All E.R. 513.

[2] [1945] P. 30, 38.

[3] [1947] P. 103, 107; 63 T.L.R. 450; [1947] 2 All E.R. 95.

I refer also to *Beer* v. *Beer*,[4] for I think that Willmer J. summarizes some considerations in regard to a matter of this kind very helpfully. He says: "It is argued that even if the "charge of adultery has not been proved to the satisfaction of "the court, the husband still has a good defence to proceedings "based upon desertion if the conduct of the wife has been such "as to create in his mind a reasonable belief that she has been "guilty of adultery. In *Glenister* v. *Glenister*,[5] in which a "husband surprised his wife in circumstances of a most compromising character, it was held by the Divisional Court that "although the husband's charge of adultery was not made out, "he was entitled to succeed in his defence to his wife's charge "of desertion, on the basis that the circumstances were such as "to induce in his mind a bona fide and reasonable belief in his "wife's guilt. This decision was distinguished in *Wood* v. "*Wood*,[6] where the only evidence of adultery was the birth of a "child three hundred and forty-six days after the last date upon "which the parties were proved by admissible evidence to have "cohabited. The Divisional Court, following *Gaskill* v. *Gaskill*,[7] "declined to hold that the evidence was sufficient to convict the "wife of adultery. They further held that since the husband's "belief in his wife's guilt was not induced by such conduct on "her part as would lead a reasonable person to believe her guilty "of adultery, but was induced only by the apparently unusual "period of gestation, no sufficient excuse for absenting himself "from cohabitation had been made out to absolve him from a "charge of desertion. In both these cases, it will be observed, "the husband failed to make good his charge of adultery against "the wife; but in the one his belief in her guilt was held to be "sufficient to absolve him from a charge of desertion, whereas "in the other it was not. I apprehend that the distinction "between the two cases is this. Where the husband's belief is "induced by actual conduct on the part of the wife of a "suspicious or incriminating nature, it is sufficient—provided it "is bona fide held, and in the absence of explanation—(which "must, of course, be a reasonable explanation)—to furnish the

---

[4] [1948] P. 10, 13; 63 T.L.R. 606; [1947] 2 All E.R. 711.

[5] [1945] P. 30; [1945] 1 All E.R. 513.

[6] [1947] P. 103.

[7] [1921] P. 425; 37 T.L.R. 977.

C. A.
1955

ELLIOTT
v.
ELLIOTT.

Morris L.J.

"husband with a good excuse for absenting himself. But where "the belief is induced, not by actual conduct of the wife, but by "extraneous circumstances, the result is different, even though "the belief be bona fide held." The judge then asked to which class of case did the case then under consideration belong.

The words last quoted refer to a case where a belief is induced, not by any actual conduct of the wife, but by extraneous circumstances, and where the belief is bona fide held. It seems to me that if the husband says: "I was told by somebody"— and it matters not for this purpose whether the husband says he was told by his mother or told by someone else—"that my "wife had gone to hospital because of a miscarriage," and does not allege the truth of that statement, or does not allege any conduct on the part of the wife inducing a belief in its truth, he is not entitled to say: "I believed the statement which was "made to me, and so I was justified in remaining away from "my wife." I say nothing as to whether the pleading might have been different, or whether there might have been any application for an amendment. On this pleading, as drawn, the commissioner came to a correct conclusion when he decided that the part of it to which I have referred should be struck out.

PARKER L.J. I entirely agree, and there is nothing which I desire to add.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co., for Swinburne & Jackson, Durham; Crossman, Block & Co. for Richmonds, Newcastle-upon-Tyne.*

F. R. D.

[LINCOLN CONSISTORY COURT.]

In re ST. MARK'S CHURCH, LINCOLN.

1955
Oct. 27;
Nov. 21.

K. M.
Macmorran

Ecclesiastical Law — Faculty — Burial ground — Disused churchyard— Proposed user of part as footpath and omnibus shelter—Whether omnibus shelter a "building" within meaning of section 3 of Disused Burial Grounds Act, 1884 (47 *&* 48 *Vict. c.* 72).
Cemetery. "Building."

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

A faculty was sought to adapt part of a disused churchyard as a footpath and to suspend a covering over the footpath to protect persons using the same from the weather:—

Held, (1) that the court had no jurisdiction to grant the faculty sought since the proposal involved the erection of a structure which was a "building" within the meaning of section 3 of the Disused Burial Grounds Act, 1884,[1] and which was therefore prohibited by that Act.

St. Nicholas Acons v. *London County Council* [1928] A.C. 469; 44 T.L.R. 656 applied.

(2) That if the petition were to be amended so as not to include a building, a faculty would be granted for the construction of a footpath and the granting of a right of way over the same. The application made in the present case would, therefore, be refused, but liberty to amend would be granted if desired.

In re Bideford Parish [1900] P. 314; 16 T.L.R. 540 applied.

PETITION for a faculty in the Consistory Court of Lincoln.

The Reverend Prebendary Arthur Oswald Jones, vicar, and two churchwardens of St. Mark's Church, Lincoln, and the Lincolnshire Road Car Co. Ltd. petitioned for a faculty authorizing them to adapt part of the disused churchyard appurtenant to St. Mark's Church so that it might form part of a footpath which the company proposed to construct, and so that a covering might be suspended over it to protect persons using the same from the weather, in accordance with plans prepared for a new omnibus station in Lincoln by Alan A. Briggs of London.

The petition was supported by unanimous resolutions passed by the Parochial Church Council of St. Mark's Church on October 24, 1954, and May 5, 1955.

W. S. Wigglesworth for the petitioners. The petition raises two questions: (1) can a faculty issue authorizing consecrated land to be used for the purposes of a footpath, and (2) if so, does the structure which it is proposed to erect over the footpath come within the meaning of a "building" prohibited by section 3 of the Disused Burial Grounds Act, 1884? As to the first question, a faculty can so issue in respect of a private right of way (*St. Gabriel, Fenchurch Street (Rector, etc.)* v. *City of London Real Property Co. Ltd.*[2]), and as to a public right of way (*In re Bideford Parish* [3]). This petition is for a private right of way inasmuch as the petitioning company seeks a right of way for its servants and passengers. While the passengers form part of the general public, they are only that part of the travelling public which uses the services provided by the company and therefore the right of way sought is really a private right.

---

[1] Disused Burial Grounds Act, 1884, s. 3: "It shall not be lawful to "erect any buildings upon any dis-"used burial ground except for the "purpose of enlarging a church, "chapel, meeting house, or other "places of worship."

[2] [1896] P. 95.

[3] [1900] P. 314; 16 T.L.R. 540.

As to the second question, section 3 of the Disused Burial Grounds Act, 1884, does not apply since that section refers only to a building erected "*upon* any disused burial ground." The proposed structure will be erected *over* the burial ground. A faculty can therefore issue. In *Foster* v. *Frazer*[4] an advertisement hoarding was held not to be a building, and in *Paddington Borough Council* v. *Attorney-General*[5] a screen erected on the perimeter of a burial ground was likewise held not to be a building. In *St. Botolph Aldersgate Without*[6] an arcade built to protect frescoes on a churchyard wall was again held not to be a building. Therefore the proposed structure is not a building within the meaning of the Act, and falls within the cases cited above.

Cur. adv. vult.

Nov. 21. MACMORRAN Ch. This is a petition dated September 16, 1955, by the vicar and churchwardens of the Parish of St. Mark, Lincoln, and the Lincolnshire Road Car Co. Ltd., seeking authority for the use of a small portion of the churchyard of the parish church to be used as a footpath. A citation was issued in the ordinary course, and no appearance has been entered in opposition. The petition was heard in court at the Chapter House of Lincoln Cathedral on October 27, 1955. Mr. Wigglesworth appeared in support of the petition, and at the conclusion of his case I reserved judgment. By consent of the parties interested, the case now comes before me in London.

I do not believe that there is any dispute in regard to the facts of the situation upon which the petition is based, and I find these to be as follows:—The churchyard in question is an ancient churchyard and is closed for burials pursuant to an Order in Council dated February 8, 1855. It is bounded on the north by a public highway, and on the west by land owned by the Lincolnshire Road Car Co., to whom I shall hereafter refer as "the company." This western boundary of the churchyard, beginning at its north-west corner at a point marked B in Plan A as put in at the hearing, runs at right angles to the northern

---

[4] [1893] 3 Ch. 158; 9 T.L.R. 502.
[5] [1906] A.C. 1; 22 T.L.R. 55.
[6] [1900] P. 69.

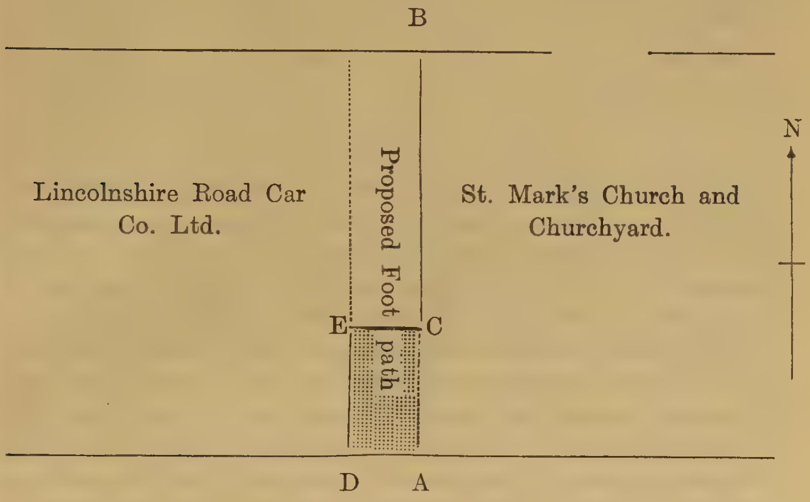
1955

St. Mark's Church, Lincoln, *In re.*

Macmorran Ch.

frontage for almost its whole length, but at its southern end it projects into the company's land for a length of 26 feet and to a breadth of 6 feet. This projection is shown on plan A, is marked A, C, E, D, and is thereon coloured pink. I refer to this area as "the pink land."

Plan A


B
Lincolnshire Road Car Co. Ltd.
Proposed Foot path
St. Mark's Church and Churchyard.
N
E
C
D
A

It is clear from the plan that except for the projection formed by the pink land, the boundary common to the churchyard and the company's property would be in a straight line for the whole of its length, but that the existence of the projection is a source of difficulty to the company in the development of their land as an omnibus station.

The object of the petition may be described in non-technical language as to construct a new wall between points A and C so as to throw the pink land into the company's premises and so to provide a straight line throughout the whole length of the common boundary. If this object can be achieved, the company propose to construct a raised platform along the boundary for the purpose of affording access by the public from both the north and south of their omnibus station to other platforms at which passengers may leave or board the omnibuses using the station. This will involve the use of the pink land as forming part of the platform which I have described.

There is also Plan B put in at the hearing, and in view of what I have to say hereafter I wish to make the following observation at this stage. The so-called raised platform, if constructed in accordance with Plan B, seems to be in fact no more than a paved footway similar to the side pavements which are normally constructed in public streets for pedestrian traffic. It was described at the hearing as a platform but, in my view, that is rather a grandiloquent and possibly rather a misleading description. I shall hereafter refer to it merely as the "proposed "pavement."

As part of the transaction proposed by the parties the company propose to build the new wall between points A and C. But they also propose to rebuild the present boundary wall from point C to point B, and also from point B along the northern boundary of the churchyard to the existing gateway as shown on the plan. I am told that the existing churchyard wall is in a dilapidated condition, and that the effect of these proposals will be to provide the parochial church council with a new wall at the cost to the company of £1,250.

The petition recites that apart from the new wall and the platform or pavement which I have described, no buildings will be erected on the pink land. But it is proposed to place over the pink land a covering so as to provide shelter for persons using the platform. The petition thus assumes that this covering is not a building, and to this point I will refer in due course.

I am further informed that while the churchyard as a whole is properly and decently maintained, this is not so with regard to the pink land (which is described as a rubbish dump) and that so far as is known there are no interments in the pink land. It is, of course, the duty of the parochial church council (unless that duty has passed by operation of law to the City Corporation) to maintain the churchyard and its boundary walls, and if they have suffered the wall in question to become dilapidated and the pink land to become derelict, they cannot escape responsibility. But in fairness to the petitioners it must be said that the present proposals will undoubtedly benefit the parishioners by giving them a new wall costing £1,250, and may well, also, benefit those members of the public who will use the platform as part of the amenities of the omnibus station. On the other hand, this being an ancient churchyard, its consecration is presumed in law, and the Ecclesiastical Court will scrutinize carefully any proposal which seems to contradict an episcopal act by which land is declared to be for ever set apart from all profane and common uses.

I have considered this aspect of the present case, and have indicated that were the matter one for my unfettered discretion I should come to the conclusion that the merits of the petition are such that in my discretion I should be justified in granting it. The main reason, however, for ordering a hearing in court was that I had grave doubts as to my power to grant a faculty for the use of the pink land in the manner prayed. I wish to express to Mr. Wigglesworth my appreciation of his learned and interesting arguments on the law applicable to this case, and to this I will now turn.

The company desire to cover in the whole length of the platform to be constructed along their side of the line A, C, B, and southwards from point A so as to afford their patrons protection from the weather. Indeed, the covering over the pink land is part of a roof of much greater dimensions. Now by section 3 of the Disused Burial Grounds Act, 1884, it is provided that it shall not be lawful to erect any buildings upon any disused burial ground, except for certain purposes which do not cover the present application, and by section 4 of the Open Spaces Act, 1887, the expression "building" includes a temporary or movable building. This enactment must have caused embarrassment to the company, who have sought to overcome the difficulty in a very ingenious way. By means of a model produced in court it was demonstrated that the roof over the pink land would be supported by pillars outside its area; these pillars would, as it seems, be "bridged" by some sort of girder, which in its turn would carry the members of so much of the roof as would be directly over the pink land. Further, the perpendicular shelter between the roof and the top of the new wall would be suspended from above and would at no point touch the wall. It is submitted by the petitioners that as no part of this superstructure is supported by the pink land, the construction of it could not properly be described as "erecting a building upon the land" within the mischief of the section.

Illustrations of the general prohibition are contained in *Bermondsey Borough Council* v. *Mortimer*[1] and *St. Nicholas Acons* v. *London County Council*.[2] In the former, it was held that a urinal was a building; in the latter, that an electric transformer chamber sunk into the soil of the churchyard to such an extent that no part of the chamber showed above ground except for two ventilators was none the less a building "erected upon the churchyard." In the judgments delivered in both these cases the strict application of the prohibition was insisted upon. Similarly, a bandstand was held to be a building in *Attorney-General* v. *St. Pancras Vestry.*[3] *Paddington Borough Council* v. *Attorney-General*[4] was cited in argument. The subject-matter there was a screen or hoarding erected to prevent a neighbouring occupier from acquiring a right to light, and it was held not to be a building. The case was, however, decided in a different context from that now before me.

---

[1] [1926] P. 87.

[2] [1928] A.C. 469; 44 T.L.R. 656.

The most interesting case, as it seems to me, is that of *St. Botolph Aldersgate Without,*[5] in which mural paintings on the inner side of a churchyard wall were to be protected by an arcade or covered way. It was held that such a structure did not contravene the Open Spaces Act, 1887, inasmuch as the churchyard would remain as much an open space as before, and that the covered way was designed for the protection of what under the general law is permissible in a churchyard. I have considered the other cases which were mentioned before me, especially *St. Nicholas, Leicester* v. *Langton,*[6] a consistory court decision, but that was concerned with widening a highway and is remote from the present discussion on the meaning of a "building upon a churchyard."

It seems to me that the general terms of the prohibition contained in the Act of 1884, as illustrated by the *St. Nicholas Acons* case,[7] have never been qualified in a manner which will assist the petitioners. It is interesting to note that although the transformer station in that case was constructed almost wholly below the surface of the churchyard it was nevertheless held to be "upon" the churchyard.

I have accordingly come to the conclusion so far as concerns the roof, that this petition must fail. I am not impressed by the ingenious attempt to isolate the small area of the proposed roof and to establish that that area of roof, 26 feet by 6 feet, is not a building. I regard that area of a roof as part of a building and I decide that the proposals proposed by Plan A would contravene the statute. But if I am mistaken in that, I still regard the superficial area of 26 feet by 6 feet as a building, and I hold that if constructed as proposed it will be built "upon" part of a disused burial ground.

The rest of the case may be more briefly disposed of. I am satisfied that I have power to grant a right of way over the

---

[3] (1893) 69 L.T. 627.

[4] [1906] A.C. 1.

[5] [1900] P. 69.

[6] [1899] P. 19.

[7] [1928] A.C. 469.

1955

ST. MARK'S CHURCH, LINCOLN, *In re.*

Macmorran Ch.

pink land, a right in the nature of an easement. It is clear from the decision in *In re Bideford Parish*[8] that the court may sanction by faculty the use of consecrated land for the purpose of widening a highway. I think that such a faculty can permit the paving of a strip of land so added to the highway—that seems to me to be ancillary to the use for which the faculty may be granted; and I see no valid reason why the pink land may not be similarly paved. But if the petitioners take the view that a right of way without a roof will not serve their purpose I can only say that I regret the result. If, on the other hand, they are prepared to accept the easement, they must satisfy me that the platform on the pink land does not amount to a building upon it, but is merely an ancillary work to the right of passage. I am satisfied that the proposed pavement disclosed in Plan B is not a building and I am accordingly prepared to authorize its construction. I shall require that some permanent indication of the consecrated nature of the pink land be incorporated in the new wall between the points A and C.

In view of the terms which I have indicated, I will not now either reject or allow the petition until the petitioners have had an opportunity of considering my judgment. But if they wish to take the case to a higher court I will content myself at this stage with saying that I reject so much of the petition as deals with the roofing in of the pink land, and reserve consideration of the question whether the platform to be constructed is in itself a building. But I may add that if the section shown on Plan B is to be followed I shall have no difficulty in sanctioning this part of the petitioners' proposals. I say this because in my view Plan B as drawn discloses a mere pavement and no more. Whether I am right or wrong in my conclusions, I hope I may say without impropriety that I find this subject-matter to be one upon which an authoritative decision of the Provincial Court is very desirable.

Faculty refused in part.

Solicitor: *M. H. B. Gilmour.*

---

[8] [1900] P. 314; 16 T.L.R. 540.

1955
Nov. 23;
Dec. 14.

Barnard J.

In re WILBY, DECD.

Adoption—Succession—Conflict of laws—Intestacy—Probate—Letters of administration—Application by adoptive mother—Adoption valid by law of foreign domicile—English domicile at time of death—Adoptive parent not entitled—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23)*—Adoption Act,* 1950 (14 *Geo.* 6, *c.* 26), *ss.* 1 (1), 13 (1) (4), 45 (1).

Conflict of Laws.

On the distribution of an estate on an intestacy the provisions of section 13 of the Adoption Act, 1950, apply only to adoptions made in the courts in this country, in Scotland, and in Northern Ireland; and an adoption made under a foreign jurisdiction does not come within its scope.

An adopted child died intestate, domiciled in England, and an application for a grant of letters of administration to the estate was made by the adoptive mother. At the time of the adoption both the adoptive mother and the child were domiciled in Burma, and the adoption was made in accordance with the law of Burma:—

Held, that, although the adoption might be recognized in this country for some purposes, the adoptive mother could not be regarded as the lawful mother for the purposes of the English law of succession, and she was, therefore, not entitled to succeed to the deceased's estate on the intestacy. To hold otherwise would involve the recognition by the English courts of any foreign adoption, provided that the adopter and the adopted were domiciled in the country where the adoption was completed, for the purposes of succession to property under English law. The impossible task could not be left to a judge to grant or refuse such an application as the present according to how closely the law of adoption in such foreign country approximated to our law of adoption.

In re Wilson, decd. Grace v. *Lucas* [1954] Ch. 733; [1954] 1 All E.R. 997 considered.

SUMMONS for a grant of letters of administration adjourned into open court.

The deceased was born in Burma on July 14, 1924, and her parents were a Mr. and Mrs. Skinner, Mr. Skinner being a brother of Mrs. Wilby. Throughout their lives both Mr. and Mrs. Skinner were domiciled in Burma and Mrs. Wilby and her husband, Mr. Wilby, were also domiciled in Burma until the year 1933, when they settled in England. Mr. and Mrs. Wilby had no issue of their marriage and on April 27, 1926, they adopted the deceased in accordance with the law of Burma. There was no doubt that, at that time, both Mr. and Mrs. Wilby and the deceased were all domiciled in Burma. A further deed of adoption was entered into on September 6, 1930, between

Mr. Skinner and Mr. Wilby whereby the latter adopted Mary Rose Skinner, the lawful sister of the deceased, and the deceased. No explanation was forthcoming as to why the deceased was included in this deed of adoption, in view of the fact that she had already been legally adopted by both Mr. and Mrs. Wilby. In the year 1933 Mr. and Mrs. Wilby paid a visit to England and decided to settle there, and in the year 1935 both adopted daughters joined their adoptive parents in England and became domiciled in England and so remained at all times thereafter. Both Mr. and Mrs. Skinner predeceased the deceased, as also did Mr. Wilby, who died in the year 1946. On May 31, 1954, the deceased purported to make a will leaving everything to her adoptive mother, but expressing the wish that something should be given to her two nephews and niece. The document was entirely in the handwriting of the deceased and signed by her but not witnessed. The deceased died on July 8, 1954, intestate, a spinster, without issue, leaving her surviving three lawful brothers and a lawful sister. Her estate was of the value of about £568 gross, and consisted solely of personalty. The adoptive mother applied by summons to show cause why letters of administration should not be granted to her as lawful mother by adoption and the only person entitled to the estate.

During the course of the hearing it was proved by expert evidence that the adoption was valid according to the law of Burma and that, by that law, the adoptive mother would have been entitled to administration of the deceased's estate.

Michael Corley for the applicant. According to the expert evidence the adoption proceedings were legal and valid according to the law of Burma and the applicant would be entitled by that law to administration of the estate; the question is whether she is entitled to administration according to the English law of succession. The principal case to be distinguished is *In re Wilson, decd. Grace* v. *Lucas*,[1] in which Vaisey J. held that a child, who had been validly adopted according to the law of Quebec, where the child was born, was not entitled to succeed upon the intestacy of the adoptive father. In that case the adoptive parents were not domiciled in Quebec but in England and, it is submitted, that is the distinguishing factor between *In re Wilson*[2] and the present case, in which all the parties to the adoption were domiciled in Burma at the date of the adoption proceedings. The absence of domicile in the country of adoption was emphasized by Vaisey J. in *In re Wilson*[3]; he said[4] that, if the testator had been domiciled in Quebec, the case before him would have been different and stronger.

---

[1] [1954] Ch. 733; [1954] 1 All E.R. 997.

[2] Ibid.

Apart from that case there is no decision of the courts of this country precisely in point, but some useful observations upon the general principles which should guide the court on a matter such as this are to be found in *In re Goodman's Trusts.*[5] That was a decision on legitimation that a person legitimated according to the law of her domicile was entitled to succeed as next-of-kin under the Statute of Distributions to the estate of her father's sister. The judgment of Cotton L.J.[6] is relied upon, and particularly the passage in which he states[7] that he cannot understand upon what principle a person legitimate by the law of his or her domicile of origin is not to be regarded as legitimate everywhere. What was there said as to legitimation applies equally to adoption and to the present case, and one has to look to the law of Burma to see whether the adoption was recognized by that law so as to entitle the adoptive mother to succeed. That was so. The fact that the adoptive parents and child changed their domicile to England in 1935 does not make any difference. When they acquired an English domicile the law of succession to be applied has, of course, to be that of England, but they brought with them the status validly acquired in Burma.

[Barnard J. In the words of Sir William Scott in *Dalrymple* v. *Dalrymple*,[8] as quoted in the judgment of Cotton L.J. in *In re Goodman's Trusts*[9]: "The status . . . of a claimant must be "tried by reference to the law of the country where the status "originated."]

Moreover, the judgment of James L.J. in *In re Goodman's Trusts*[10] recognizes that status is to be determined by the law of the domicile of origin, and one asks, therefore, why, merely because the applicant came with the deceased to set up a domicile in England, should the child, which according to the law of Burma she was entitled to regard as her own, become a stranger to her? This is especially so in so far as they came to a country which recognized the concept of adoption. In *In re Andros*[11] the above decision was applied to the word "children" in a will, which was held to include legitimated children.

---

[3] [1954] Ch. 733.
[4] Ibid. 744.
[5] (1881) 17 Ch.D. 266.
[6] Ibid. 290.
[7] Ibid. 292.
[8] (1811) 2 Hagg.Con. 54.
[9] 17 Ch.D. 266, 292.
[10] Ibid. 297.
[11] (1883) 24 Ch.D. 637.

With regard to decisions of foreign courts which may have some persuasive value, reference may be made to *Ross* v. *Ross*,[12] in which it was held that a child, validly adopted according to the law of the parties' domicile, was entitled to succeed to the real estate of the adoptive father although at the time of the death the parties were domiciled in a State other than that in which the adoption had taken place. In *Burnfiel* v. *Burnfiel*[13] it was held, on appeal, that the plaintiff, who had been adopted by the deceased according to the law of Iowa, in which State the parties to the adoption were then domiciled, which recognized his right in those circumstances to a grant of letters of administration, was not entitled to a grant, the deceased having died domiciled in Saskatchewan, whose law did not recognize adoption. The case was decided on this narrow ground and the facts can be distinguished from those in the present case since English law recognizes the institution of adoption. *In re Pearson, The Equity Trustees Executors and Agency Co. Ltd.* v. *Michaelson-Yeates*[14] is, perhaps, not of great assistance since the decision was based on the very narrow ground that the will, for the purpose of which it was sought to show that a child validly adopted in Tasmania was "issue" according to the law of Victoria, Australia, was earlier in date than the adoption order. It was, however, stated obiter by Gavan Duffy J.[15] that the question whether the adoptive child was "issue" was to be decided by the law of Tasmania. Similarly, in the New Zealand case of *In re Brophy, Yadwyn* v. *Martin*[16] it was held that an adoptive child was not issue of his adoptive parents because, according to the law of the parties' domicile at the time of the adoption, namely, New York, the status of an adoptive child was not approximated to that of a child born in lawful wedlock, but again it was affirmed[17] that the law of the child's domicile must be recognized as to status.

In re Wilson[18] is the only authority binding upon this court. That case, however, can be distinguished, and in the present case the adoptive mother and daughter brought their status with them from Burma when they acquired a domicile in England, where adoption is a recognized institution.

---

[12] (1880) 129 Mass. 243.

[13] [1926] 2 D.L.R. 129.

[14] [1946] V.L.R. 356.

[15] Ibid. 361–362.

[16] [1949] N.Z.L.R. 1006.

[17] Ibid. 1017.

[18] [1954] Ch. 733.

The three brothers and the sister of the deceased consented to the application; they did not appear and were not represented.

Cur. adv. vult.

Dec. 14. BARNARD J., reading his judgment, referred to the facts as set out above and continued: In view of the fact that the deceased died intestate and domiciled in England the law governing succession to her estate is English law, and the question which I have to decide is whether the applicant, as the adoptive mother of the deceased, can be regarded as the lawful mother so as to succeed to her estate. In all cases of intestacy, the distribution of the estate is regulated by the Administration of Estates Act, 1925, as amended by the Intestates' Estates Act, 1952, the Legitimation Act, 1926, and the Adoption Act, 1950. [His Lordship read section 13 (1) of the Adoption Act, 1950,[1] and continued:] The adoption order referred to is clearly an order under that Act: see section 1 (1) and section 45 (1).[2]

The only authority to guide me is a decision of Vaisey J. in *In re Wilson, decd. Grace* v. *Lucas.*[3] In that case spouses, who were British subjects and domiciled in England, when on a visit to Canada adopted an infant in Montreal, in accordance with the law of the Province of Quebec, and on the death of the husband intestate, Vaisey J. held that the adopted child was not entitled to succeed under the intestacy as his child. The difference between that case and this is that in the case before me the adopters were domiciled in the country in which the adoption was completed, whereas in *In re Wilson, decd.*,[4] they were not, and Vaisey J. in the course of his judgment says[5]: "What the position would have been if the "adopters as well as the infant had been domiciled in Quebec

---

[1] Adoption Act, 1950, s. 13 (1): "Where, at any time after the making of an adoption order, the "adopter or the adopted person or "any other person dies intestate in "respect of any real or personal "property (other than property subject to an entailed interest under a "disposition made before the date of "the adoption order), that property "shall devolve in all respects as if "the adopted person were the child "of the adopter born in lawful wedlock and were not the child of any "other person."

[2] Adoption Act, 1950, s. 1 (1): "Subject to the provisions of this "Act, the court may, upon an application made in the prescribed "manner by a person domiciled in "England or Scotland, make an "order (in this Act referred to as "an adoption order) authorizing the "applicant to adopt an infant."

S. 45 (1): ". . . 'adoption order' "has the meaning assigned to it by "section one of this Act."

[3] [1954] Ch. 733; [1954] 1 All E.R. 997.

[4] [1954] Ch. 733.

[5] Ibid. 741.

"I need not inquire," but later towards the end of his judgment he says [6]: "In my judgment, if the testator had been domiciled "in Quebec at the time when the infant defendant was adopted, "the case of the latter would have been different and very much "stronger."

The problem I have to decide is whether or not, in those circumstances, this case is strong enough to succeed. I have been referred to most of the authorities to which Vaisey J. was referred, and with which he deals in detail in his judgment.[7] Vaisey J. stated that they did not afford any clear guidance on the point which he had to consider,[8] nor do I think that they afford me any clear guidance on the point I have to consider.

I respectfully agree with Vaisey J.[9] that legitimation cases, as in *In re Goodman's Trusts*,[10] must be applied with extreme caution, if at all, for, in contrast to adoption, the meaning of legitimation is plain and unambiguous. Whereas adoption constitutes an artificial relationship, its conditions, its aims and its effect differ widely in the various countries and under the various types of civilization. In eastern Asia, for instance, adoption serves to maintain ancestor worship. Methods of adoption also vary greatly, and Wolff's Private International Law [11] gives some striking examples.

The adoption of the deceased on April 27, 1926, is in the form of an agreement between Mr. Skinner, the deceased's father, who was at that time a widower, and Mr. and Mrs. Wilby, whereby the former handed over the deceased to the latter, and resigned his rights and duties as a parent, which the latter accepted. This agreement was registered on the same date. There was no order of any court either confirming or approving this agreement, but none the less it constitutes a valid adoption by the law of Burma.

Vaisey J. refers,[12] in his judgment, to Theobald on Wills,[13] where it is pointed out that adoption is, in the absence of statutory provision, governed by the law of the domicile of the adopter and of the child, but that it does not follow that that law will determine whether an adopted child can succeed to property as a child of the adopter.

The adoption in this case would, no doubt, be recognized as valid in this country for some purposes, but what I have to decide is whether it entitles the adoptive mother to succeed to the deceased's estate on an intestacy. If I were to accede to this summons, it would have to be on the basis that the English courts recognized any foreign adoption, provided that the adopter and the adopted were domiciled in the country where the adoption was completed, for the purpose of succession to property under English law. For it could not, in my view, be left to a judge to grant or refuse such an application as I have before me, according to how close the law of adoption in such foreign country approximated to our law of adoption. Such a task would be an impossible one as Vaisey J. points out in his judgment.[14]

---

[6] [1954] Ch. 733, 744.
[7] Ibid. 742–743.
[8] Ibid. 742.
[9] Ibid.
[10] (1881) 17 Ch.D. 266.
[11] 2nd ed., p. 398.
[12] [1954] Ch. 733, 741.
[13] 11th ed., p. 282.

This would seem to be a hard case, for the applicant was an aunt of the deceased, and since the adoption in April, 1926, they lived together as mother and daughter until the death of the latter. Moreover, if the deceased had died domiciled in Burma, the courts of this country would have followed the law of the deceased's domicile: see *Enohin* v. *Wylie*.[15]

But no hardship need be done, and the deceased's wishes, as expressed in her unexecuted will of May 31, 1954, can be carried out by her sister, who is now Mrs. Davey, and who resides in this country, applying for a grant to her estate, as the lawful sister and one of the persons entitled to share on an intestacy, and having obtained the grant, Mrs. Davey can, with the consent of her three brothers, hand over the property to Mrs. Wilby.

I have come to the conclusion that the Administration of Estates Act, 1925, as amended by the Adoption Act, 1950, must be construed strictly, and by section 13 (4) of the latter Act,[16] the references to an adoption order in the preceding subsections are to include references to an adoption order made in Northern Ireland. With the sole exception of Northern Ireland, the adoption orders referred to in the Act are orders made by the courts in this country and in Scotland. I therefore find it impossible to bring an adoption made under some foreign jurisdiction within the scope of section 13 of the Act, and this summons must be dismissed.

Solicitors: *Pedley, May & Fletcher.*

E. J.

---

[14] [1954] Ch. 733, 741.

[15] (1862) 10 H.L.C. 1, 13.

[16] Adoption Act, 1950, s. 13 (4): "The references in this section to "an adoption order include references to an order authorizing an "adoption made after the commencement of this Act under the Adoption of Children Act (Northern "Ireland), 1929, or any enactment of "the Parliament of Northern Ireland "for the time being in force."

BUCKLE *v.* BUCKLE (*orse.* WILLIAMS).

1955
June 30;
Nov. 7, 8.

Karminski J.

Husband and Wife—Marriage—Validity—Divorce—Marriage in India within six months of decree absolute—Indian Divorce Act, 1869 (*No. IV*), *s.* 57—*Indian and Colonial Divorce Jurisdiction Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 40), *s.* 1 (1) (*a*) (*b*) (*d*).

The provision in section 57 of the Indian Divorce Act, 1869, whereby a party to a divorce is not able lawfully to remarry until six months from the date of the decree absolute, is not applicable to a divorce in India granted under the jurisdiction of the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940.

A wife whose previous marriage had been dissolved in India by decree absolute on March 31, 1944, married in India on April 3, 1944, a husband who presented a petition for divorce in England in 1954. The Indian divorce had been granted under the provisions of the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940. The second marriage was declared null and void in India in 1953 on the ground that the statutory period of six months in section 57 of the Indian Divorce Act, 1869, had not expired:—

Held, (1) that the provisions of section 1 (1) (*b*) of the Act of 1926 whereby the appropriate courts "act and give relief on "principles and rules as nearly as may be conformable to those "on which the High Court in England for the time being acts and "gives relief" excluded the provision against remarriage within six months of decree absolute in the Act of 1869, for by English law the parties to divorce are free to remarry forthwith after decree absolute.

(2) That the marriage of April, 1944, was therefore valid.

(3) That on the facts a decree nisi of divorce should be granted.

UNDEFENDED PETITION by husband for divorce on the ground of desertion or, in the alternative, for a decree of nullity.

The wife, whose parents had been born in India, had married a member of the Indian Civil Service, one Williams, in Rawalpindi on December 6, 1934. On November 29, 1943, Williams was granted a decree nisi of divorce in the High Court of Judicature, Lahore, on the ground that the respondent had committed adultery with the petitioner in the present suit. That decree purported to have been granted under the jurisdiction conferred by the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940. Although the normal period under that jurisdiction between decrees nisi and absolute was then six months, the decree was in fact made absolute on March 31, 1944. There was no evidence as to why the time had been shortened.

The parties in the present suit were married at the Staff College, Quetta, India, before the district registrar on April 3,

1955

BUCKLE
v.
BUCKLE.

1944; and there was one child of the marriage born in 1945. The husband had been born in the United States of America, but his father had been an Englishman domiciled in England, and although the husband had spent a considerable period of his life abroad, he had at all times looked on England as his permanent home and was accordingly at all material times domiciled in this country.

In August, 1949, when the parties were living in Canton, China, the wife and child were evacuated to Hong Kong in view of the tense political situation. Before she left, the wife told the husband that it was the end of the marriage. The husband, however, visited the wife and child from time to time in Hong Kong, but the wife refused to return to Canton in January, 1950, when the situation had eased, and again refused to return in May, 1950, when the husband went to stay with her for a few days in Hong Kong. From that time onwards the parties lived separate and apart, the wife maintaining her previous attitude in correspondence, the husband attempting to get her to change her mind. In September, 1952, he again went to Hong Kong to see her; but at her insistence they stayed in separate hotels, and his efforts to effect a reconciliation failed. She consented to his taking the child of the marriage with him. The husband later made a final attempt to reconstitute the marriage when he went to Hong Kong from the Philippine Islands; but the wife again refused to alter her attitude. In February, 1954, he filed a petition in England for divorce on the ground of desertion since at least May, 1950; and it was held in these proceedings that the wife's conduct had in fact amounted to desertion.

After the petition had been served, it was discovered that the wife herself had initiated in 1953 certain proceedings in India, under section 18 of the Indian Divorce Act, 1869, for a decree of nullity,[1] and that she had in fact been granted a decree nisi of nullity on April 21, 1953, which had been made absolute on December 22, 1953. Service of that petition had been by two

---

[1] Indian Divorce Act, 1869 (No. IV), s. 18: "Any husband or wife "may present a petition to the District Court or to the High Court, "praying that his or her marriage "may be declared null and void."

S. 19: "Such decree may be made "on any of the following grounds:— "(1) [Impotence]; (2) [within the "prohibited degrees of consanguinity "or affinity]; (3) [either party a "lunatic or idiot at time of mar-"riage]; (4) that the former hus-"band or wife of either party was "living at the time of the marriage, "and the marriage with such former "husband or wife was then in "force."

S. 20: "Every decree of nullity "of marriage made by a District "Judge shall be subject to confirma-"tion by the High Court . . ."

1955

BUCKLE v. BUCKLE.

advertisements in the daily Hindustani Times; but the husband had not learnt of them. In view of the information received, his petition was amended in July, 1954, to pray on the alternative for a decree of nullity upon similar grounds.

The grounds of the Indian divorce were set forth in the judgment of Shri Gurden Singh, a district judge at Delhi (Divorce Case No. 5 of 1953). After reciting the nature of the petition, and the absence of appearance to the notice by way of advertisement, the judge referred to the wife's previous marriage, to the date of the decree absolute, and to her remarriage three days afterwards, and continued: "In the present position, it is con-"tended that the marriage between [the wife] and [the hus-"band], which was celebrated on April 3, 1944, was null and "void as it was before the expiry of the statutory period of six "months[2] from the date of the decree dissolving the marriage "between [Williams] and [the wife] was made absolute. From "the statement of [the wife] it is abundantly clear that the "marriage between her and [the husband] was celebrated three "days after the decree nisi obtained by [Williams] against the "present petitioner [the wife] was made absolute. . . . This "marriage is clearly invalid according to section 57 of the Indian "Divorce Act, 1869,[2] as has been held so often and quite recently "by a special bench of the Punjab High Court in Matrimonial "Reference No. 3 of 1949, 'John Cecil Harrington Ford v. "'Emilja Threlfall.'

"[The wife] claims Indian domicile, her parents were born "in India, and she last resided with [the husband] at Delhi * "where [he] was employed with the Burma Shell Company. "There does not appear to be any collusion between the parties.

"For the above reasons, I accept the petition and grant [the "wife] an ex parte decree nisi declaring her marriage with [the "husband] null and void."

---

[2] Indian Divorce Act, 1869 (No. IV), s. 57: "When six months after "the date of an order of a High "Court confirming the decree for a "dissolution of marriage made by a "District Judge have expired, or "when six months after the date of "any decree of a High Court dis-"solving a marriage have expired, "and no appeal has been presented "against such decree to the High "Court in its appellate jurisdiction. "or when any such appeal has been "dismissed, or when in the result of "any such appeal any marriage is "declared to be dissolved, but not "sooner, it shall be lawful for the "respective parties to the marriage to "marry again, as if the prior mar-"riage had been dissolved by death ". . ."

* This conflicts with the evidence accepted in the present proceedings.

The decree was made absolute on December 22, 1953, in the High Court of Judicature for the State of Punjab sitting at Simla, upon the order of Khosla, Karnam Singh and Kapur JJ.

Leave was granted for the evidence to be given on affidavit, and after preliminary argument the court invoked the assistance, upon the law, of the Queen's Proctor.

Desmond Ackner for the husband. The wife's decree of nullity in India (which was only discovered after the present proceedings had begun) was based upon section 57 of the Indian Divorce Act, 1869,[2] which precludes remarriage until six months have expired after the decree of dissolution. That decree has no force in this country, for the husband is, and was at the time of the marriage, domiciled in England. The question in issue concerns the essential validity of the marriage, not its form; and the essential validity of a marriage is to be determined by the law of the husband's domicile or the intended matrimonial domicile. "The validity of a marriage so far as regards the observance of formalities is a matter for the lex loci celebrationis. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage": *per* Lord Greene M.R. in *De Reneville* v. *De Reneville*.[3]

[KARMINSKI J. If there is no marriage at all, can a woman acquire a domicile of marriage? Her case was that there was no marriage ab initio.]

It is submitted that since the question is one of essential validity the governing law is that of the husband's domicile. The test, therefore, is this: was the wife by English law in a position to marry the husband on April 3, 1944, although the six months required by Indian law had not elapsed and although the Indian court held that she was domiciled in India immediately prior to the ceremony? Her previous marriage had been dissolved under the provisions of the Indian and Colonial Divorce Jurisdiction Act, 1926, and the whole purpose of that Act was to give to a court in India jurisdiction to dissolve marriages of persons domiciled in England in appropriate cases.

---

[2] For note 2, see p. 183.

[3] [1948] P. 100, 114; 64 T.L.R. 82; [1948] 1 All E.R. 56.

Such decrees have by the statute the same effect as if the court had been sitting in England. Under English law either party may remarry when a decree has been made absolute: section 13 (1) of the Matrimonial Causes Act, 1950 [4]; and have been able to do so since the original Act of 1857. There has never been a waiting period as under the Indian Divorce Act, 1869, and in such circumstances the marriage on April 3, 1944, was valid. [*Starkowski* v. *Attorney-General* [5] was referred to.]

James Comyn for the Queen's Proctor. The husband's assertion of an English domicile is not disputed, nor is it disputed that the former husband was domiciled in England, although the domicile of the wife on the decree absolute appears to be in doubt and the Indian court found her in the 1953 proceedings to be domiciled in India. But the local law provided an impediment against the wife's re-marriage which could not be cleared by questions of domicile. The English courts recognized in *Warter* v. *Warter* [6] and *Le Mesurier* (*orse. Gordon*) v. *Le Mesurier* [7] the validity of the restriction upon remarriage imposed by section 57 of the Indian Divorce Act, 1869; and although it may be difficult to reconcile the reasoning in those cases with that in *De Reneville* v. *De Reneville*,[8] the distinction may be this: that those who rely for the validity of a marriage upon the validity of a foreign decree of divorce must show that that decree was valid in all respects, and that the parties were free to remarry by the law of divorce invoked. The only exception is where the foreign law contains a penal provision as to remarriage.

Although *Keyes* v. *Keyes and Gray* [9] might appear to assist the husband in so far as it established that the Indian courts had no jurisdiction under the Act of 1869 in regard to the dissolution of a marriage between persons domiciled in the United

---

[4] Matrimonial Causes Act, 1950, s. 13 (1): "Where a decree of "divorce has been made absolute "and either there is no right of "appeal against the decree absolute, "or, if there is such a right of "appeal, the time for appealing has "expired without an appeal having "been presented or an appeal has "been presented but has been dis-"missed, either party to the mar-"riage may marry again." The section substantially reproduces s. 184 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 (in force at the time of the 1944 proceedings under consideration) which replaced s. 57 of the Matrimonial Causes Act, 1857.

[5] [1954] A.C. 155; [1953] 2 All E.R. 1272.

[6] (1890) 15 P.D. 152.

[7] (1930) 46 T.L.R. 203.

[8] [1948] P. 100.

[9] [1921] P. 204; 37 T.L.R. 499.

1955

BUCKLE
v.
BUCKLE.

Kingdom, and upon that basis might be said to have decided that the whole Act was inapplicable to persons domiciled in England, the Acts of 1869 and 1926 should, it is submitted, be read together. *Keyes* v. *Keyes and Gray* [9] did not exclude the provisions of section 57 of the Act as to remarriage, neither did the Act of 1926.

[KARMINSKI J. But English law does not provide for a period of six months after decree absolute before remarriage.]

If the legislature in 1926 had intended to overrule section 57, it would have said so expressly. The Act of 1926 does not lay down a complete divorce jurisdiction, although it deals with procedure, and the provisions of the Act of 1869 should be held still to be applicable except in so far as they are inconsistent with the Act of 1926. Section 57 is not inconsistent with that Act.

Under the law applicable in the English courts in 1944 the period between decree nisi and decree absolute was six months; that period had not expired before the wife's decree absolute in 1944 and there is no evidence of any order abridging the time. The decree absolute was therefore invalidly pronounced. [Reference was also made to *Pugh* (*orse. Eperjesy*) v. *Pugh*.[10]]

Ackner in reply. The Act of 1926 provided an entirely new jurisdiction in divorce in India, and it is unnecessary in such circumstances to consider whether the restriction against remarriage under the Act of 1869 was wrongly held to apply in *Warter* v. *Warter* [11] and *Le Mesurier* v. *Le Mesurier*,[12] which concerned decrees granted before the Act of 1926.

[KARMINSKI J. It would appear that the judges had not applied their minds to that point.]

The essence of section 1 (*a*) and (*b*) of the Act of 1926 [13] is that the principles to be observed in the Indian courts under that Act are those of the English courts; and our courts provide for the capacity to remarry on decree absolute.

---

[9] [1921] P. 204.

[10] [1951] P. 482; [1951] 2 T.L.R. 806; [1951] 2 All E.R. 680.

[11] 15 P.D. 152.

[12] 46 T.L.R. 203.

[13] Indian and Colonial Divorce Jurisdiction Act, 1926 (as amended by the Indian and Colonial Divorce Jurisdiction Act, 1940, and the Government of India (Adaptation of Acts of Parliament) Order, 1937), s. 1 (1): "Subject to the provisions "of this Act, *a High Court in* "*British India constituted by his* "*Majesty by Letters Patent* shall "have jurisdiction to make a decree "for the dissolution of a marriage, "and as incidental thereto to make "an order as to damages, alimony "or maintenance, custody of children, and costs, where the parties "to the marriage are British subjects "domiciled in England or in Scotland, in any case where a court in "*British India* would have such "jurisdiction if the parties to the "marriage were domiciled in India:
"Provided that—(*a*) the grounds "on which a decree for the dissolution of such a marriage may be "granted by any such court shall be "those on which such a decree might "be granted by the High Court in "England according to the law for "the time being in force in England; and (*b*) any such court in

The 1944 decree dissolved the previous marriage: "The "decree absolute . . . dissolved the marriage from the moment "it was pronounced, and at the date when the appeal by the "intervener abated it stood unreversed. The fact that neither "spouse could re-marry until the time for appealing had expired "in no way affects the full operation of the decree. It is a judg-"ment in rem, and unless and until a court of appeal reversed "it the marriage was for all purposes at an end": *per* Lord Goddard in *Marsh* v. *Marsh*.[14] No question of appeal arose in respect of the 1944 decree in this case: the marriage was at an end, and by English law the parties could remarry. *Warter* v. *Warter*[15] also recognized that the marriage itself was at an end on decree absolute.

As a result of the decision in *Keyes* v. *Keyes and Gray*[16] it was realized that the Act of 1869 gave no jurisdiction in divorce over persons resident in India and domiciled in England; and after the immediate validating Act of 1921[17] the legislature sought to provide by the Act of 1926 an extension of the jurisdiction of the courts of England and Scotland to cover that

"exercising such jurisdiction shall "act and give relief on principles "and rules as nearly as may be con-"formable to those on which the "High Court in England for the "time being acts and gives relief; "and (*c*) no such court shall grant "any relief under this Act except in "cases where the petitioner *resided* "in India at the time of presenting "the petition and the place where "the parties to the marriage last re-"sided together was in India, or "make any decree of dissolution of "marriage *on the ground of adul-"tery, cruelty or any crime*, except "where either the marriage was "solemnized in India or the adul-"tery, *cruelty* or crime complained "of was committed in India; and "(*d*) any such court may refuse to "entertain a petition in such a case "if the petitioner is unable to show "that by reason of official duty, "poverty or any other sufficient "cause, he or she is prevented from "taking proceedings in the court of "the country in which he or she is "domiciled, and the court shall so "refuse if it is not satisfied that in "the interests of justice it is desir-"able that the suit should be deter-"mined in India."

The italicized words in the first paragraph were substituted by the Government of India (Adaptation of Acts of Parliament) Order, 1937, and the italicized words in proviso (*c*) substituted by the Act of 1940. Save that the reference to domicile in England or Scotland is by s. 1 of the Colonial and Other Territories (Divorce Jurisdiction) Act, 1950, to be construed as referring to domicile in any part of the United Kingdom, the section is not affected by the Act of 1950.

[14] [1945] A.C. 271, 278; 62 T.L.R. 20.

[15] 15 P.D. 152.

[16] [1921] P. 204.

[17] Indian Divorces (Validity) Act, 1921.

limited class of persons who were resident in India but domiciled in England or Scotland. Section 1 (1) (*d*)[18] of the Act emphasizes that the jurisdiction is an emergency and delegated jurisdiction for the benefit of those who live abroad and are prevented by special circumstances from taking proceedings in this country.

The Indian courts themselves would appear to have regarded the Act of 1926, when properly complied with, as allowing for remarriage on decree absolute, for in *Taylor* v. *Wenkenbach*,[19] where the decree had been made absolute on July 7, 1930, and one of the parties had remarried on August 2, 1930, the real basis upon which the second marriage was held to be void was, it is submitted, the failure to register the decree obtained under the Act of 1926.[20] It was only because the registration then essential had not been carried out that the court held that section 57 of the Act of 1869 became applicable; if the section had applied to every case of a decree under the Act of 1926 there would have been no point in considering whether or no there had been registration.

Before the Act of 1926 there was no jurisdiction in divorce in the Indian courts in regard to persons domiciled in the United Kingdom: *Keyes* v. *Keyes and Gray*.[21] The Act was the first to give those courts such jurisdiction; and it could not be said to amend or add to the Act of 1869 because there was no jurisdiction at all under that Act. The Act of 1926 is a self-contained statute, and its wording if not expressly at least impliedly excludes the earlier Act.

---

[18] See note 13, ante.

[19] (1937) I.L.R., 1 Cal. 417.

[20] By s. 1 (2) of the Act of 1926 it was provided that: "Any such "order for alimony or maintenance "or for custody of children shall "have effect in India on the making "thereof, but save as aforesaid no "such decree or order shall have any "force or effect either in India or "elsewhere unless and until registered in manner hereinafter provided." The subsection was amended by the Indian and Colonial Divorce Jurisdiction Act, 1940, and provides that: "Where a decree or "order is made under this section, "the proper officer of the court making the decree or order shall "transmit a certified copy thereof ". . . for registration [in England "or Scotland] and upon receipt of a "copy of the decree or order purporting to be so certified and transmitted, the decree or order shall be "registered accordingly.

The Indian court (Costello J.) held that: "The position of the petitioner "—she having obtained a decree "under it [Act of 1926] but without "registering it or causing it to be "registered in the High Court in "England—is precisely the same as "that of a person who obtains a "decree under the Act of 1869 and "then remarries before the expiry of "six months from the date of the "decree being made absolute," and pronounced the marriage of 1930 void.

[21] [1921] P. 204.

[KARMINSKI J. It is easy to appreciate how the difficulties arose about Indian divorces in view of the historical background and the gradual growth of the doctrine that domicile was the test of jurisdiction. And there may have been a much larger body of Englishmen domiciled in India in 1869 than in later days when communications improved.]

KARMINSKI J. stated the facts as to the marriage, read section 57 of the Indian Divorce Act, 1869, and, referring to the fact that the period between decree nisi and decree absolute in the Indian divorce proceedings was less than six months, continued: I do not, myself, attach much importance to that matter, although I do not know the grounds on which the period was abridged; but I am not disposed for a moment to question the power of the Indian court to expedite the decree absolute and still less the propriety of such abridgment. It is to be noted that at that time the war of 1939–1945 was still in progress and the present husband was at that time a serving officer.

At any rate, on April 3, 1944, the present husband and the present wife were married at Quetta, which was then in India. It is clear from those dates that the period of six months required by section 57 of the Indian Divorce Act, 1869, had not expired in that not only were there not six months between March 31, 1944, and April 3, 1944, but it has also been pointed out that not even had there been six months from the granting of the decree nisi on November 29, 1943. That being the case, if section 57 of the Indian Divorce Act of 1869 were applicable it is, I think, clear that the parties could not be and were not free to go through a legal ceremony of marriage in April, 1944.

Under those circumstances I have had to consider the question of whether the marriage entered into between the parties, and apparently valid in 1944, was or was not a valid and subsisting marriage.

Mr. Ackner, who opened this case with his usual care and skill, put the matter very fairly before me and indicated at once the points of difficulty. It occurred to me that the matter was of sufficient difficulty, and perhaps of sufficient importance, to warrant my asking once again for the assistance of the Queen's Proctor, this being a case in which the wife had not appeared and had taken no part in the proceedings, and I have had, as always, the very greatest assistance from Mr. Comyn on behalf of the Queen's Proctor in his presentation of his side of the case.

The real point I have to decide is one which arises from certain subsequent proceedings which were taken in India after the parties in this case had separated. That the wife is in desertion of the husband there can be no doubt at all, and, indeed, Mr. Comyn, on behalf of the Queen's Proctor, told me at once that after the usual inquiries had been made he was in the position to admit, without any reservations, that the desertion alleged by the husband had been proved—assuming always that there had been a valid marriage between the parties.

I turn now for a moment to the subsequent proceedings in India, which were initiated by the wife after she had left the husband in Hong Kong or Canton. I use the alternative deliberately because it is not quite clear from the evidence, which has been on affidavit, where the last cohabitation was. The wife brought proceedings in the courts at Delhi in which she apparently asserted that she was entitled to a decree of nullity against her husband under section 18 of the Indian Divorce Act, 1869. The husband did not appear in those proceedings and, indeed, it is quite clear that he was not served, but an advertisement had been put in an Indian newspaper.

I am bound to say that I do not know why the present petitioner was not served since he had, for many years, been serving with a well-known oil company. Only quite recently he had been in correspondence with his wife and, indeed, it would appear that the husband's solicitors and the wife's solicitors were in touch at that time. At any rate, the husband was not served and was not present, and the judge of the court at Delhi found that the marriage which these parties had purported to go through in 1944 was null and void, as it was before the expiry of the statutory period of six months from the date of the decree dissolving the marriage between the husband and wife was made absolute.

The judgment proceeded to deal with the provisions of section 57 of the Indian Divorce Act, 1869, and the cases decided thereunder, and stated: "The petitioner claims Indian domicile; "her parents were born in India and she last resided with the "respondent in Delhi." In point of fact, the present petitioner was then employed by an oil company in China. I have no information as to the domicile of the respondent wife and I am not able to make any decision about it. With regard to her husband, Mr. Williams, I again have no information, but I cannot exclude the possibility that his domicile was English and he had never changed that.

So far as the present petitioner is concerned, it would appear that his domicile of origin was English and has always so remained. Regarding the suggestion that the husband was employed by a company in Delhi after the marriage, that appears to be incorrect because a good deal of his married life was spent in China with the present respondent.

I must not be thought to be criticizing that judgment, though it does appear to be based on some possible misapprehension of fact. What I am concerned with is this: notwithstanding that judgment by a court in India, is the marriage between the parties a valid one or not?

I turn now to the original decree obtained by Mr. Williams in 1943. That was expressed to be under the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, and nobody has queried the power or jurisdiction of the Indian court to make that decree. Mr. Ackner, for the petitioner, has argued that section 57 of the Indian Divorce Act, 1869, is really quite irrelevant to the position of the present case because the decree dissolving the respondent wife's previous marriage to Mr. Williams was granted under a different Act or Acts, namely, the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940.

It is, I think, important to look for a moment at the provisions of the Indian and Colonial Divorce Jurisdiction Act, 1926. That Act apparently came into existence following the very important decision in *Keyes* v. *Keyes and Gray*.[1] It was important for this reason, that prior to that decision it had been apparently thought that the Indian courts had power to dissolve the marriages of British domiciled subjects in India under the Indian Divorce Act, 1869, and force was given to that view by a number of decisions of which it is only necessary to refer briefly to that given by Sir James Hannen P. in *Warter* v. *Warter*,[2] where precisely the same point arose, namely, that a marriage had taken place within the six months after the final decree. Sir James Hannen P. found that the lady who had obtained the divorce was subject to the Indian law of divorce and could only contract a valid second marriage by showing that the incapacity arising from her previous marriage had been effectually removed by the proceedings taken under that law. That decision appears to have assumed that the Indian courts had jurisdiction over persons resident in India but not domiciled there. In *Keyes* v. *Keyes and Gray*[3] (to which I have already referred) Sir Henry Duke P. had the advantage of having the matter very fully argued before him. It is interesting to note that in the course of the argument the Crown, which was represented by the then Attorney-General, Sir Gordon Hewart, and other counsel, expressed a different view from those of the India Office, which was represented by Sir Erle Richards, but Sir Henry Duke P., having heard the arguments of both the Crown and of the India Office, came to the conclusion that the divorce courts in India had no jurisdiction to decree a dissolution of marriage between parties not domiciled in India, even though the marriage had been celebrated in India and the parties were, in fact, resident there.

---

[1] [1921] P. 204; 37 T.L.R. 499.

[2] (1890) 15 P.D. 35; 6 T.L.R. 391.

[3] [1921] P. 204.

In the result two Acts were passed, one immediately to restore the position of those who had no doubt innocently obtained decrees under the Indian Divorce Act, 1869, and then remarried, and subsequently the very important Act of 1926 which extended not only to India but virtually to the whole Commonwealth and Empire. The Act was entitled "An Act to confer on Courts "in India and other parts of His Majesty's Dominions jurisdiction "in certain cases with respect to the dissolution of marriages, "the parties whereto are domiciled in England or Scotland, and "to validate certain decrees granted for the dissolution of the "marriage of persons so domiciled."

By section 1 of the Act: "Subject to the provisions of this "Act a High Court in British India . . . shall have jurisdiction "to make a decree for the dissolution of a marriage, . . . where "the parties to the marriage are British subjects domiciled in "England or in Scotland, in any case where a court in British "India would have such jurisdiction if the parties to the marriage "were domiciled in India:" and there follows a number of very important provisos: "Provided that (*a*) the grounds on which a "decree for the dissolution of such a marriage may be granted by "any such court shall be those on which such a decree might be "granted by the High Court in England according to the law for "the time being in force in England"; and "(*b*) any such court "in exercising such jurisdiction shall act and give relief on "principles and rules as nearly as may be conformable to those "on which the High Court in England for the time being acts "and gives relief." There follow other provisos, of which (*d*) I think is worth mentioning: "any such court"—that is, any court in India—"may refuse to entertain a petition in such a "case if the petitioner is unable to show that, by reason of "official duty, poverty or any other sufficient cause, he or she "is prevented from taking proceedings in the court of the country "in which he or she is domiciled, and the court shall so refuse "if it is not satisfied that in the interests of justice it is desirable "that the suit should be determined in India."

It is clear, therefore, that by a special Act of the legislature the courts in India and, indeed, elsewhere, were empowered to deal with the matrimonial affairs of persons domiciled in this country and to grant them relief.

It is, I think, of great importance here to look for a moment at the proviso (*b*) which I have already read and which states expressly that the Indian courts, in this case, "shall act and give "relief on principles and rules as nearly as may be conformable "to those on which the High Court in England acts."

So far as the provisions of section 57 of the Indian Act, 1869, are concerned, there is no parallel provision in any English statute. Section 57 of the first divorce Act in this country, in 1857, expressly provided the contrary, since it indicated that when a marriage had been dissolved by a final decree either of the parties were free to remarry forthwith. That provision of our law has remained unchanged until this day, and has been recorded in subsequent statutes.*

At the time the 1926 Act was passed into law the relevant section relating to remarriage of divorced parties was section 184 of the Supreme Court of Judicature (Consolidation) Act, 1925. At the time of the passing of the 1940 Act, the relevant provision was section 12 of the Matrimonial Causes Act, 1937. That had altered section 184 to some extent, but only in matters relating to the duties of clergy in remarrying divorced persons or of lending their churches or chapels for that purpose.

It is not, in my view, necessary to examine the Indian and Colonial Divorce Jurisdiction Act, 1940, which was, as I understand it, designed to deal with certain difficulties which had arisen under the 1926 Act, and was expressed to be, under section 1, for "The removal of doubts as to the effect of the Matrimonial "Causes Act, 1937, on divorce jurisdiction under Indian and "Colonial Divorce Jurisdiction Act, 1926."

It was argued on behalf of the Queen's Proctor that the Indian and Colonial Divorce Jurisdiction Act, 1926, by implication brought into operation parts of the 1869 Act, including section 57, and Mr. Comyn rightly called my attention to *Warter* v. *Warter*,[4] to which I have already briefly referred, and to a more recent decision, *Le Mesurier* v. *Le Mesurier*,[5] a decision of Lord Merrivale P. The facts of that case were a good deal

---

* See now the Matrimonial Causes Act, 1950, s. 13 (1).

[4] 15 P.D. 152.

[5] (1930) 46 T.L.R. 203.

1955

BUCKLE
v.
BUCKLE.

Karminski J.

different from the present case. The Lahore High Court had dissolved an earlier marriage there on January 7, 1921; subsequently on February 7, 1921, the petitioner in that case and the respondent went through a ceremony of marriage at Colombo in Ceylon. The position when the matter came before Lord Merrivale P. was this: that any doubts as to the validity of the Lahore decree had been removed already by the Indian Divorce (Validity) Act, 1921, which was the first of the amending statutes to which I have referred briefly and, also, by section 3 of the 1926 Act. So that, in spite of the difficulties which had been brought to light by his decision in *Keyes* v. *Keyes*,[6] Lord Merrivale P. was dealing in *Le Mesurier's* case [7] with the position that here there was an Indian decree under the Act of 1869 which would have been invalid but for the validating provisions of the Indian Divorce (Validity) Act, 1921. Lord Merrivale P. found that, though the decree was valid, the marriage was invalid because the period of six months had not expired before the remarriage and he accordingly pronounced a decree of nullity. But here I am dealing with a decree which on the face of it is expressed to have been made by the Indian courts under the 1926 and 1940 Acts, and I cannot—doing my best to construe the 1926 statute—bring into it the provisions of the 1869 Indian Act. If the legislature had so desired, I do not doubt that they would have said so, but as I read the statute I think that the Act says exactly the opposite, because it says expressly in section 1 (1) (*b*) that the Indian courts in exercising this jurisdiction "shall act and give relief on principles and rules as nearly as may "be conformable to those on which the High Court in England "for the time being acts and gives relief."

I have to look, of course, at the law exercised in this court as it stood in 1926, and I have no doubt that the law then, as now, allows parties to remarry as soon as a final decree has been pronounced. As Mr. Ackner has argued with great force, the circumstances of the 1926 Act, which I have briefly recounted, make it really essential for it to contain express words embodying the provisions of the 1869 Act, if that was its object. But, as he also pointed out, on the face of it section 1 of the 1926 Act, expressly or by implication, excludes the inclusion of any of the provisions of the Indian Act, 1869.

In my view, the marriage between the parties in the present case was a perfectly valid one. It was entered into after the decree nisi of a competent court dissolving the marriage had

[6] [1921] P. 204.

[7] 46 T.L.R. 203.

1955

BUCKLE
v.
BUCKLE.

Karminski J.

been made absolute, and I think that the right course here is to apply the English principles of law as they then stood and as they still stand, and to say that the parties were free to enter into marriage at the time they did—namely, on April 3, 1944.

I, therefore, find that the marriage was a valid one and is still subsisting. I also find that the wife has been guilty of desertion as alleged in the petition and I pronounce a decree nisi dissolving the marriage between the parties on the grounds of such desertion.

Decree nisi of divorce.

Solicitors: *Stilgoes; The Queen's Proctor.*

J. B. G.

CRAWFORD *v.* CRAWFORD.

1955
Nov. 4.

Lord Merriman P. and Barnard J.

Husband and Wife—Justices—Cruelty—Intention to injure—Conviction for indecent exposure.

The offence of indecent exposure by a husband may amount to cruelty.

A husband pleaded guilty to an act of indecent exposure and asked for six other similar offences to be taken into consideration. The wife's health was affected when she learnt of the offences, with their resulting scandal. The husband's bullying and aggressive attitude prior to the discovery had contributed to a state of friction which had existed throughout the marriage:—

Held, that the husband had in the circumstances been guilty of persistent cruelty.

Jamieson v. *Jamieson* [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875; *Cooper* v. *Cooper* (*No.* 1) [1955] P. 99; [1954] 3 All E.R. 415 applied.

Lewis v. *Lewis*, post, 205n., distinguished.

Per curiam. It might in a desertion case be necessary to know precisely what the wife knew at the moment when she left home.

APPEAL from an order of the Manchester (County) Justices sitting at Strangeways made on August 24, 1955, on the grounds of persistent cruelty and of wilful neglect to maintain.

The parties were married in April, 1947, and there was one child, a boy born in April, 1948. On June 18, 1955, the wife left the house when she learned that a charge was pending against the husband that on June 8, 1955, he had "wilfully, openly and "lewdly exposed his person with intent to insult a female." On August 19, 1955, a court of summary jurisdiction sitting at Strangeways in the petty sessional division of Manchester made a two-years' probation order in respect of that charge, to which the husband had pleaded guilty, with a condition of medical treatment. Six other similar offences had been taken into consideration.

The justices, who found, in addition to injury to the wife's health arising from the shock of learning of the indecent exposure, that the husband's bullying and aggressive attitude had contributed to a state of friction existing throughout the marriage, gave the following reasons for their finding of persistent cruelty and wilful neglect to maintain:

"1. On July 8, 1955, the defendant was found guilty of an "offence of indecent exposure and asked for six other similar "offences to be taken into consideration, being sentenced for the "offence on August 19, 1955. This course of conduct though not "entered upon by the defendant with the object of injuring his "wife's health was such as must have been known by him had "he considered the matter to be likely to injure her health when "she came to know of it, both by reason of the shock of the "disclosure and of the gossip which would be sure to arise in the "small community in which they both lived. It was found that "the wife's health suffered in consequence. The justices also "found a state of friction existing throughout the marriage to "which the husband's bullying and aggressive attitude had "contributed.

"2. The defendant, after the complainant had left him in "consequence of the facts stated above, made no attempt to "maintain the complainant on the grounds that she refused to "see him. The justices found that this failure was wilful and "unjustifiable."

M. R. Nicholas for the husband appellant. When the wife left home she knew only that one charge of indecent exposure was pending. The husband had not at that time pleaded guilty to that charge, and the wife knew nothing of the other offences which were to be taken into account. The offence did not involve, as in *Cooper* v. *Cooper* (*No.* 1),[1] the child of the marriage; it had not taken place in the matrimonial home, and bearing in mind the medical treatment which had been ordered it was unreasonable in such circumstances for the wife to be apprehensive of the future.

---

[1] [1955] P. 99; [1954] 3 All E.R. 415.

[LORD MERRIMAN P. But there is more here than a question of apprehension; there is evidence of conduct which caused injury to health.]

Cooper v. *Cooper* (*No.* 1),[1] where the husband had been convicted of an indecent assault upon the child of the marriage, *Ivens* v. *Ivens*,[2] where the husband had committed indecent assaults on the wife's child by a former marriage, and *Woollard* v. *Woollard*,[3] where the wife had herself been put in jeopardy by the husband's criminal financial activities, and where her justifiable remonstrances were met with resentment, are to be distinguished, for the offence was not directly connected with the home, and the wife herself was not involved.

The offence of which the husband was found guilty was analogous to that of the husband in *Lewis* v. *Lewis*,[4] a case of an indecent assault upon another woman in a cinema. That offence was held not to amount to constructive desertion, and such an offence could not, it is submitted, amount to cruelty. To find cruelty here would be to go much further than *Cooper* v. *Cooper* (*No.* 1).[5]

Moreover, this is a case of persistent cruelty; the fact that the husband asked at the trial for other cases, of which the wife previously knew nothing, to be taken into account, could not make the act with which the husband was originally charged, and which was the basis of the wife's case, persistent cruelty. Such loss of health as there may have been was due to the particular moment of discovery, and there was nothing further.

If, however, the act of indecent exposure was a climax following upon a course of ill-treatment, and not of a marriage which had merely been unhappy, defeat must be conceded, but the husband should in those circumstances have an opportunity of having the previous history more fully investigated and be granted a re-hearing. But it is submitted that the sexual misconduct before a third party, away from the matrimonial home, which was the act which the wife really relied on as affecting her health, should not be coupled with the nagging and bullying conduct

---

[1] [1955] P. 99.

[2] [1955] P. 129; [1954] 3 All E.R. 446.

[3] [1955] P. 85; [1954] 3 All E.R. 351.

[4] Post, 205.

[5] [1955] P. 99.

1955

CRAWFORD
v.
CRAWFORD.

alleged, which are of an entirely different character. [Reference was also made to *Buchler* v. *Buchler*,[6] *Kaslefsky* v. *Kaslefsky*,[7] *Simpson* v. *Simpson*,[8] *Squire* v. *Squire*[9] and *Usmar* v. *Usmar*.[10]]

C. N. Lees for the wife respondent. Although the indecent exposure took place away from home, it was in public, and there was a reasonable apprehension that it might be repeated before the child of the marriage. When a wife in such circumstances learns of the offence, and her health is affected, it is sufficient to found a charge of cruelty. *Cooper* v. *Cooper* (*No.* 1),[11] and the cases cited therein, show that sexual offences against third parties may amount to cruelty, and the fact that the wife does not learn of them at once is irrelevant. *Lewis* v. *Lewis*[12] is in any event to be distinguished, for there was only one offence in that case; here the husband, who must be presumed to have known the effect upon the wife if he were found out, and the scandal which would reflect on her, nevertheless repeated his offence on several occasions.

Upon a charge of cruelty the court must look at all the surrounding circumstances, as the justices in fact did: *Jamieson* v. *Jamieson*.[13] Even if there is no connexion between the types of cruelty charged, they must be taken together in deciding whether cruelty, or persistent cruelty as here, is established. [*Lang* v. *Lang*[14] was also referred to.]

Nicholas replied.

LORD MERRIMAN P. This is an appeal by a husband against a decision of the county justices sitting at Strangeways, Manchester, on August 24, 1955, by which they found him guilty of persistent cruelty, and, incidentally, of wilful neglect to provide reasonable maintenance for his wife. The whole argument has turned on the finding of persistent cruelty, and it is said that the justices were quite wrong, in the circumstances of this case, in finding cruelty at all, and certainly in finding persistent cruelty, and that we ought to set the order aside. Alternatively, it is suggested that they have misdirected themselves and have not fully appreciated the issues, and that the case ought to be remitted to a fresh panel of justices to be retried.

[6] [1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319.

[7] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398.

[8] [1951] P. 320; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955.

[9] [1951] P. 49; 64 T.L.R. 371; [1948] 2 All E.R. 51.

[10] [1949] P. 1; 64 T.L.R. 500.

[11] [1955] P. 99.

[12] Post, 205.

[13] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

[14] [1955] A.C. 402; [1954] 3 All E.R. 571.

1955

CRAWFORD
v.
CRAWFORD.

Lord
Merriman P.

As I see it, the substance of the case made against this husband was two-fold. First, it was said that an atmosphere of friction in this matrimonial home had been produced by the husband's bullying and nagging his wife. It was not suggested that that form of ill-treatment had involved any physical violence. If it was anything, it was what is described as "mental cruelty," and there was evidence corroborating the wife in that particular, though it is right to say that little or no detail was given about that particular ground beyond saying, as she did, that he was very bullying and critical towards her, as if he would like to make her inferior to him; never approved of anything; did not bother with the child; was always "picking on" the child, and so forth. If that stood alone it may be that it would have been necessary to find out more about that type of conduct, but it is corroborated to some extent by her aunt, who was called, and said that when she had seen them together he had an aggressive and bullying attitude towards his wife; and as the justices find that that was true it is quite impossible for us to say, on that aspect of the matter, that there was no evidence to support the finding. So much for that treatment in so far as it affected the wife's health.

The more serious allegation, and the one round which controversy has centred in this case, is that on June 18, 1955, the wife became aware of a pending charge against her husband. The charge was of "wilfully, openly and lewdly exposing his person "with intent to insult a female." The date of that offence was June 8, 1955, and the wife learned of it for the first time 10 days later.

[His Lordship referred to the conviction, observing that the husband had not merely pleaded guilty to the offence but had asked for no less than six other offences of a similar nature to be taken into account, and continued:] We are not trying a desertion case. We are trying a cruelty case, and the difference may be of importance in this respect, that it might, in a desertion case, be necessary to know precisely what the wife knew at the moment when she left home; but it is conceded that in this charge of cruelty it is the whole course of conduct of the husband in this particular respect which we are entitled to take into account in its impact upon the wife's mental health, and I repeat that we are concerned only with what, for short, is now called mental cruelty, and so called with the approval of the House of Lords.

Now in what, if I may be allowed to say so, was a most admirable argument, Mr. Nicholas cited the recent authorities on this matter, including, amongst others, the very full review of the recent case law given by Karminski J. when he was sitting in this court with me in *Cooper* v. *Cooper* (*No.* 1),[1] and Mr. Nicholas's review was so full that I do not propose to repeat it. I content myself with extracting from the authorities one or two principles which I think are now established. In the appeal in the House of Lords in *Jamieson* v. *Jamieson* [2] emphasis was laid on the principle that cruelty might be inferred from the whole facts and atmosphere disclosed in the proof, and, without quoting the specific opinions in which this was stated, it was laid down by at least two of the noble Lords who decided that case, approving Lord Keith of Avonholm, as he now is, who had dissented in the court below,[3] that it is a wrong approach to put the various acts or conduct alleged into a series of separate compartments and say of each of them that by themselves they cannot pass the test of cruelty and, therefore, that the totality cannot pass that test. Another point which is plainly laid down in that case is that though actual intention to injure the wife in a case of mental cruelty must be a very important factor, and may be a decisive factor in the particular case, it is not essential. Finally—and I am now taking a passage from the opinion of Lord Tucker [4]—it is undesirable, if not impossible, by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases in which no physical violence is averred. I do not think that there is much doubt about the particular test which was being referred to, if obliquely, in that passage.

Next, in the decision in *Cooper* v. *Cooper* (*No.* 1),[5] it is laid down that " sexual offences "—(borrowing a phrase which I am reported as using in another case [6])—" directly relevant to the " husband's conjugal obligations " may be ill-treatment of the wife; and I also derive from *Cooper* v. *Cooper* (*No.* 1) [7] the further principle that such ill-treatment may be coupled with physical ill-treatment (which manifestly is not ejusdem generis, for the one is mental ill-treatment and the other is physical ill-treatment), in order together to found a charge of persistent cruelty.

In passing, I would make two observations. The first is that the principle that the offence against a third party may be ill-treatment of the wife goes back, as Karminski J. showed in his judgment, a long way; it is not a matter of recent decision, but a recent case, that of *Boyd* v. *Boyd*,[8] which has been the subject of a certain amount of judicial controversy, was eventually decided on the ground of cruelty, and a petition which would have been dismissed on the ground of desertion was amended to a charge of cruelty, on which a decree was granted by the same judge. A reference to the report of that case is now most conveniently set out as an appendix to the report of *Cooper* v. *Cooper* (*No.* 1).[9]

---

[1] [1955] P. 99, 106.
[2] [1952] A.C. 525.
[3] 1951 S.C. 286.
[4] [1952] A.C. 525, 551.
[5] [1955] P. 99, 123.
[6] *Simpson* v. *Simpson* [1951] P. 320, 333.
[7] [1955] P. 99.

The other thing which I wished to add was this, that although *Cooper* v. *Cooper* (*No.* 1)[9] was a decision only of this Divisional Court it was, in fact, approved within a matter of days by the Court of Appeal, presided over by Lord Goddard C.J., in *Ivens* v. *Ivens*,[10] from the headnote of which I will read, for convenience, one paragraph, as it summarizes much of what I have already attempted to say: "A criminal and indecent assault by a "husband on a child might amount to cruelty to the child's "mother although no intention to injure the mother was shown. "In the present case the husband must have known what the "effect of his conduct would be on his wife and on her state of "health and yet, careless and indifferent to what the effect would "be, he continued with his indecent conduct. The facts proved "constituted a strong case of cruelty and the wife was entitled "to a decree," and the dismissal of her petition by the special commissioner was reversed. See also *Lang* v. *Lang*.[11]

I am not unmindful of the fact that the strength of the conduct in the several cases which have recently been reported differs, and I am not unmindful of the fact that in another desertion case, *Lewis* v. *Lewis*,[12] an isolated allegation of indecent assault by the husband on an attendant at a cinema, which was unaccompanied, so far as the report [13] shows, by any other form of ill-treatment whatever, did not justify the wife in leaving. But obvious as it may be that an assault of a criminal nature on a daughter in the family home, or on a child of tender years in the family home, may almost speak for itself in relation to the effect likely to be produced on the wife, it seems to me to be only a question of degree, and, therefore, a question for the court to decide, whether a series of offences of indecent exposure and the scandal resulting therefrom are likely to have a less unfavourable impact on the wife even than offences so gross as those I have referred to.

---

[8] [1955] P. 126n.; (1938) 55 T.L.R. 3; [1938] 4 All E.R. 181.

[9] [1955] P. 99.

[10] [1955] P. 129.

[11] [1955] A.C. 402.

[12] Post, 205.

[13] The Times, May 21, 1954.

I should find it difficult, if the justices had said anything of the sort, to support a finding that the effect of the shock to the wife which this particular discovery had was due, to quote another passage from one of the opinions in *Jamieson* v. *Jamieson* [14] in the House of Lords, "to abnormal hypersensitiveness." However, the justices have not found anything of the sort. On the contrary, they have found that although this course of conduct was "not entered upon by the defendant with the object of "injuring his wife's health," that course of conduct "was such "as must have been known by him had he considered the matter "to be likely to injure her health when she came to know of it," and they add "both by reason of the shock of the disclosure and "of the gossip which would be sure to arise in the small community in which they both lived. It was found that the wife's "health suffered in consequence."

The wife's evidence was that on learning this news on June 18, 1955, she lost the use of her legs and fainted with shock. The evidence of an aunt was that two days later the wife came round to her in a very distressed condition, that she was hysterical for two days, and that since she had returned home she had been very distressed and had lost weight. I emphasize the loss of weight, because one of Mr. Nicholas's arguments was that we could only attribute the loss of health to this particular moment of discovery, and that there was nothing more; and that, as the husband did not repeat his offence, and was not likely to repeat his offence (for he was put on probation), there was little likelihood of any apprehension of further injury. But she did not lose all that weight on the day when she heard the news. That was one of the progressive effects of the shock, and if this matter stood alone, which it does not, I should be unable to agree with the proposition that such injury as was involved in her immediate reaction was all that we ought to take into account. There is the plainest evidence of injury to health. I will not say that that was originated by the initial news of this affair, because I do not think that it was, but no doubt it was gravely aggravated by it and no doubt was increased when it turned out, as it probably did turn out when the whole truth came to light on August 19, 1955, that on the first occasion she had not been told the whole story.

---

[14] [1952] A.C. 525, 535 (*per* Lord Normand).

But I do not think, on the evidence, that the injury to health originated only on this shocking discovery, and, indeed, in my opinion, the justices have found the opposite. After saying that her health suffered in consequence, they have also found "a "state of friction existing throughout the marriage to which the "husband's bullying and aggressive attitude had contributed." As the wife left home on the day of the discovery it is obvious that the bullying and aggressive attitude preceded the shock to her mental health which she received on June 18, 1955. It was, therefore, rather a case of aggravation of a process which had already been begun by the husband's other conduct of a bullying and aggressive nature, than of that conduct having contributed to an injury first received on June 18, 1955.

I have already said that there is authority for the proposition, which I should have thought, prima facie, was an obvious proposition, that in taking the whole circumstances into account one has to take account of the effect on her health of the whole story. But there is already, as I say, authority for the fact that in considering the whole story one can take two things which, after all, are of an essentially different character, namely, the injury to the mental health from one aspect of the story and the physical injury from violence on the other aspect of the story, in order to show that the two combined amount to persistent cruelty. Well, if one can do that with regard to two different sorts of ill-treatment I am bound to say that I do not understand why one should not do it with regard to two different forms of mental ill-treatment, and take the whole story into account, and thus arrive at a conclusion of persistent cruelty.

I recognize that this case is, to some extent, a borderline case, but it is just in such borderline cases (unless the court below have misdirected themselves in some matter of law or some failure to appreciate the evidence) that the principle that an appellate tribunal should not interfere with the decision of those who have heard and seen the witnesses most strongly prevails.

For the reasons I have given, although I recognize that it is a very short and probably quite inadequate summary of the situation, I cannot see that the justices have misdirected themselves in any particular, or that they have failed to appreciate the nature and weight of the evidence. That being so, I do not think that we have any right to interfere with their decision. I have no doubt that they appreciated that it was a difficult case —in fact I think they show that they did—and we ought to support the finding at which they arrived.

1955

CRAWFORD
v.
CRAWFORD.

BARNARD J. I agree entirely with what my Lord has said. One fact is perfectly clear in this case, and that is that the husband's conduct caused injury to the wife's health. Now, it by no means follows from that that the husband has been guilty of cruelty. My Lord, in his speech in *Jamieson* v. *Jamieson*,[15] made it perfectly clear that any conduct would not do, and Lord Tucker, in a later speech,[16] said that when one is dealing with conduct which is not physical violence it is impossible to say that any class of conduct must be cruelty or that it cannot be cruelty; and then he went on to give a very good guide, which I do not think I need repeat, in coming to a conclusion as to whether such conduct amounts to cruelty or not.

In this case I must admit that I have felt a very grave difficulty. It certainly is, as my Lord has said, a borderline case, and the question is, is it on the side of *Cooper* v. *Cooper* (*No.* 1)[17] or is it on the side of *Lewis* v. *Lewis*?[18] I fully realize that *Lewis* v. *Lewis*[18] was not a cruelty case. It was a desertion case. It was not unnaturally a desertion case, because the wife was relying on one isolated act of indecency committed by her husband, and there was not any suggestion that such act had injured her health, and that is, no doubt, the reason why she summoned her husband on the ground of desertion and not cruelty.

The justices in this case seem to me to have adopted the very proper attitude of looking at the facts as a whole, and the facts as a whole do not consist solely of the husband's act of indecent exposure, which was undoubtedly the culminating act, and which caused the wife to leave. They have fully taken into account all the previous conduct of the husband of a bullying and aggressive character towards his wife.

I agree with my Lord that, in considering the reasons given by the justices, I fail to find that they have, in any way, misdirected themselves. In those circumstances it would be quite wrong to interfere with their findings on these facts, and I agree with my Lord that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *John Pinto for J. Neville Brookes, Manchester; Pattinson & Brewer for F. Edwin Monks & Co., Manchester.*

J. B. G.

---

[15] [1952] A.C. 525, 538.

[16] Ibid. 550.

[17] [1955] P. 99.

[18] Post, 205.

NOTE.

1954
May 20.

Barnard and Willmer JJ.

[PROBATE, ETC., DIVISION.]

LEWIS *v.* LEWIS.

Husband and Wife—Justices—Desertion—Constructive desertion—Indecent assault—Isolated offence—Subsequent attempts to effect reconciliation—Desertion not found.

A husband admitted that he had made indecent advances to a woman sitting next to him in a cinema, and later pleaded guilty to a charge of indecent assault. His wife, when she read in a newspaper of the proceedings before the committing justices, left him without waiting for the trial and adamantly rejected all approaches for a reconciliation. The husband's offence was an isolated one in respect of which he was granted an absolute discharge:—

Held, that the husband could not in such circumstances be guilty of desertion, for the wife, who had in view of the nature of the offence—an assault—no ground for suspecting adultery, was not justified in adopting her uncompromising attitude in rejecting the husband's approaches even if his initial act could be said to amount to constructive desertion. To hold otherwise would be to provide a ground for divorce which was not provided by the legislature.

Edwards v. *Edwards* [1948] P. 268; 64 T.L.R. 61; [1948] 1 All E.R. 157 applied; *Boyd* v. *Boyd* [1955] P. 126n.; (1938) 55 T.L.R. 3; [1938] 4 All E.R. 181 distinguished.

APPEAL from an order made by the Port Talbot justices, on the ground of desertion.

The following statement of facts is substantially taken from the judgment of Willmer J.: The parties were married in August, 1942, and the matrimonial home was in Port Talbot, which was also the home of the husband's mother. The parties cohabited at that address until a date in or about May, 1952, when the wife left the husband. During those 10 years of cohabitation there were some disputes between the parties, and some unpleasantness, largely due to the wife's complaint against the husband that he would not work; but that aspect was dismissed by the justices as amounting to no more than the ordinary wear and tear of married life. The sole reason given by the wife for leaving the husband was that he was charged with the offence of indecently assaulting another woman. The assault was alleged to have taken place in a picture theatre, and he was charged with, and admitted, making indecent advances towards the woman who was sitting next to him. The wife first learned of the charge against her husband when she read of it in the local newspaper. She read the account of the proceedings before the committing justices, when he was committed for trial. Without waiting for the trial to take place, she forthwith packed up and left. It appeared that the husband suffered from a nervous breakdown at about that time, and was in a mental hospital for some months, although it was not known whether it was for that reason. The trial of the husband did not take place until September, 1952; he then pleaded guilty to the offence charged, and he was granted an absolute discharge.

The husband, in his evidence before the justices, said that he had approached his wife on a number of occasions to take him back. In particular, he said that whilst he was in the mental hospital he wrote her two letters asking her to take him back, but that these were ignored by the wife.

The summons in the present proceedings was issued on March 24, 1953. There appeared to have been a number of adjournments, and the hearing did not take place until January 6, 1954, when both the wife and the husband gave evidence before the justices. The justices adjourned consideration of the matter and did not give their decision (the reasons for which are stated in the judgment of Willmer J.) for another 14 days, the order appealed from being finally made on January 20, 1954.

The husband in his evidence before the justices again said that he was sorry for what he had done, and that the one thing which he wanted to do was to patch up the quarrel and return to cohabitation with the wife.

The wife in her evidence said: "From the moment I heard about "the case against my husband I left the house to go on my own, and "I completely finished with him that day."

The justices' reasons for their decision are given in the judgments.

Geoffrey Howe for the husband appellant.
H. T. Buckee for the wife respondent.

BARNARD J. I will ask Willmer J. to give the first judgment.

WILLMER J. stated the facts substantially as set out above, observing that from what the court knew of the assault (and that information had in the main been derived from the husband's own evidence given before the justices) it did not seem to have been an assault of a particularly serious nature, and that the wife's case might be summed up in the sentence from the notes of her cross-examination: "From "the moment I heard about the case against my husband I left the "house to go on my own, and I completely finished with him that "day." His Lordship continued:

The sole question raised by this appeal, as I see it, is whether, on those facts, the justices were justified in finding the husband guilty of desertion, and, of course, that means finding him guilty of constructive desertion, for it was the wife who left the home.

It is clear that the justices took a great deal of care in considering this case, and, if I may be allowed to say so, the reasons which they give for the conclusion at which they arrived are a model of clarity, and reflect the great pains which they took. It appears that their attention was called to the judgment of this court in *Simpson* v. *Simpson*,[1] in which Lord Merriman P. quoted a considerable extract from the well-known judgment of Asquith L.J. in *Buchler* v. *Buchler*.[2] All that was clearly very much in the minds of the justices. I think that it will be convenient if I read a passage from the reasons given by the justices, so as to make it quite clear how it was that they arrived at their conclusion. They say: "The husband committed "the indictable offence of indecent assault which we considered to "be conduct and behaviour of a more vexatious character than the "wife might reasonably be expected to endure in the normal course "of married life. . . . We further considered that how a wife might "behave towards her husband in similar circumstances would vary "according to the facts of each particular case and according to the "view the wife concerned took of the offence committed, and that "whereas one wife might stand by her husband, another wife—and "in this particular instance this wife—could not be said to be "unreasonable because she did not take that view, and therefore, we "considered, could not be blamed for leaving him. Although the "husband might not have intended that the offence committed should "have been committed with the intention of causing his wife to leave "him, he must surely have realized, or acted so recklessly as not to "care, that his conduct might have serious consequences so far as his "wife was concerned." Those paragraphs, I think, contain the reasons on which the conclusion of the justices was based.

---

[1] [1951] P. 320, 331; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955.

The first ground of attack on behalf of the husband upon that decision of the justices was that assuming, without admitting, that the wife had just cause for leaving her husband, it would not in the least follow that the husband was guilty of driving her out, so as to be held to be constructively the deserter. In my judgment, on the particular facts of this particular case, there is no room for that distinction to be drawn, and I say that for this reason:—If the wife be held to have had just cause for leaving the husband, it could, as I see it, only be on the basis that that was the natural consequence of the husband's behaviour. To put it the other way round, if her leaving was not the natural consequence of the husband's behaviour, how could it possibly, upon any view, be justified? If it were the natural consequence of the husband's behaviour, then clearly it was open to the justices to say that the husband must in the circumstances be presumed to have intended the natural consequence of his conduct. If, therefore, the justices were right in the view which they took, that in the circumstances the wife had just cause for leaving, I think it would be difficult for this court to say that there was no evidence on which they could find the husband guilty of driving her out.

To my mind the crux of this case is whether the justices were, in all the circumstances, justified in concluding that the wife did have just cause for leaving the husband and remaining away from him merely on the ground that he was charged with this one isolated offence. I stress that it was a single isolated offence. There is no evidence at all that throughout the 10 years of cohabitation the husband had been guilty of any similar conduct before.

In the course of the discussion before us reference was made to

---

[2] [1947] P. 25, 45; 63 T.L.R. 100; [1947] 1 All E.R. 319.

Boyd v. *Boyd*,[3] a case which, as is well known, has in the years since its decision provoked a good deal of controversy. For myself, I have no wish to contribute anything of my own to the controversy which that decision has aroused; but it is, I think, necessary for me to refer to what was decided in that case, and what has been the subject of the criticism upon the decision. The statement of principle by Bucknill J. in that case, that before there can be a case of constructive desertion the court must be satisfied that the conduct of the husband was such as to show a clear intention on his part to drive his wife away, has several times been expressly approved by the Court of Appeal, notably by Lord Greene M.R. in *Buchler* v. *Buchler*.[4] But the actual decision of the case has since been disapproved on more than one occasion by this court, notably in *Edwards* v. *Edwards*,[5] a case which itself has more than once been expressly approved by the Court of Appeal.

In *Boyd* v. *Boyd* [6] the material facts were that early in the married life the husband had been convicted and sentenced to five years' penal servitude for incestuous adultery. Following that, the wife forgave him and took him back, and they lived together again for a period. Later, the husband was again convicted, this time for an indecent assault upon a girl of under 13 years of age. For that offence he was sentenced to imprisonment for 20 months. This second conviction caused a grievous shock to the wife, and on this occasion she left him, and left him for good. On those facts Bucknill J. declined to find the offence of desertion proved against the husband, because he could find no evidence of any intention on his part to drive the wife out. He did, however, give leave to amend the petition so as to enable the wife to allege cruelty, and at a subsequent hearing he did on that ground grant the wife a decree.[7] The criticism of Bucknill J.'s decision which has more than once been made by this court is that he does not appear to have applied his mind to the maxim that in the circumstances the husband could be presumed to have intended the natural consequences of his acts. It has been said that had he applied his mind to that question, he could hardly have failed to come to the conclusion that the husband must be presumed to have had the necessary intent. As Lord Merriman P. said in *Edwards* v. *Edwards* [8]: "I cannot understand how any man who has been taken back after one such incident "by a sensitive and decent woman could contemplate anything else "than that a repetition of that offence would have the same result."

If it were open to us, having regard to the decision in *Edwards* v. *Edwards*,[8] to proceed on the basis that *Boyd* v. *Boyd* [9] was rightly decided on its facts, it would clearly cover the facts of this case, which are not nearly so strong against the husband as were the facts in *Boyd* v. *Boyd*.[9] But accepting, as I do, that on its facts *Boyd* v. *Boyd* [9] was wrongly decided, nevertheless it remains true to say that that case was by no means on all fours with this case. There the question was as to the inference to be drawn from the commission of an act, itself a good deal more serious than the act committed by the husband in this case, but an act which followed on a previous even more serious offence. In the present case, on the contrary, we are dealing with a single isolated act, and one of nothing like so serious import as those dealt with in *Boyd* v. *Boyd*,[9] and I desire to emphasize that in this case the stand taken by the wife, as is shown by the sentence which I have already quoted from the note of her evidence, is that that justified her in saying once and for all that she had finished with her husband.

---

[3] [1955] P. 126n.; (1938) 55 T.L.R. 3; [1938] 4 All E.R. 181.

[4] [1947] P. 25, 29.

[5] [1948] P. 268, 270–271; 64 T.L.R. 61; [1948] 1 All E.R. 157.

[6] [1955] P. 126n.

[7] Ibid. 128n.

[8] [1948] P. 268, 271.

[9] [1955] P. 126n.

The legislature has enacted that certain sexual offences—rape, sodomy, bestiality—shall of themselves be grounds for seeking a decree of divorce. It has not enacted that the commission of an indecent assault upon a third person shall be a ground for divorce. It seems to me that if we were to hold that the commission of such an offence as in this case provides a wife with just cause for withdrawing from cohabitation and staying permanently away from her husband, and, furthermore, provides grounds whereon she can allege constructive desertion against him, we should, in effect, be laying down a new ground for the relief of divorce which was not provided by the legislature. I say that because what puzzles me is to see how, in practice, a husband who has committed an offence of this nature is to terminate his desertion, if desertion it be. When I asked that question in the course of the argument I was referred to the concluding part of Lord Merriman P.'s judgment in *Edwards* v. *Edwards*,[10] to which I have already referred, and also to *Holborn* v. *Holborn*.[11] Those are cases in which Lord Merriman P. pointed out, as is well known, that desertion is a continuing offence which may be brought to an end by the offending husband making amends in such a way that the wife would be no longer justified in sustaining her refusal to resume cohabitation. One must, however, as it seems to me, read what was said by Lord Merriman P. in those cases in relation to the facts of those cases. They were both cases where what was relied on by the wife in support of her allegation of constructive desertion was a course of conduct directed against her by the husband and extending over a prolonged period of time. I can understand that when one is dealing with that sort of case opportunity should clearly be given to the husband to satisfy the wife that he has abandoned the course of conduct which gave her her ground for complaint, and if that state of affairs came about, then the wife would no longer have justification for continuing to absent herself from the husband.

But in this case we are not dealing with anything in the nature of a course of conduct. We are dealing with a single isolated act, and an act committed as long ago as May, 1952, that is to say, an act now two years old. It is, I think, not unimportant to remark that the justices did not in the events which happened deal with the case until January, 1954, by which time, of course, the husband had stood his trial for the criminal offence of which he was guilty. In the meantime he had approached his wife for a reconciliation; he had written her the letters to which I have referred and which were ignored; he had, in his evidence before the justices, expressed his contrition to the

---

[10] [1948] P. 268, 272.

[11] [1947] W.N. 70; 63 T.L.R. 87; [1947] 1 All E.R. 32.

1954

Lewis
v.
Lewis.

Willmer J.

court and stated his desire that the quarrel with his wife should be patched up. If this was not enough, in January, 1954, to bring to an end his desertion, if desertion it were, one asks oneself the question "What more could the husband do?" How is he to be any better off in 1955, or 1956, and what is his answer to be if at the end of three years' separation the wife puts on the file a petition for divorce on the ground of desertion, relying, of course, as part of her case on this decision of the justices, the subject of the present appeal?

Another point which seems to me to be of some substance was brought to our attention by counsel for the husband. It was pointed out that in this case the offence of which the husband was guilty was an assault, that is to say, an act done against the will of the woman on whom it was committed. In those circumstances it was not an act which could possibly prompt any reasonable suspicion of adultery, such as might have arisen if the act of the husband had been committed upon a woman who consented to his advances. Had the case been one where the wife could say that she had reasonable grounds for suspecting her husband to be guilty of adultery, if that were established, it would have given her just cause for absenting herself from cohabitation; but it is well established that such good cause would be removed by a judgment of the court deciding that as a fact adultery had not been proved. In such circumstances the wife's ground for continuing to absent herself from her husband would be removed, and if she did not return to him, it would be she who would be the deserter.

No such question can possibly arise in this case, and one asks oneself the question, "Can it be right that a husband whose conduct "is directed against an unwilling woman, in circumstances from which "the inference of adultery could not possibly be drawn, should be in "a worse position than a husband whose conduct might prompt a "reasonable suspicion of adultery?" It seems to me that that is a point of some substance.

In the result the conclusion at which I have arrived is that, notwithstanding the great care which the justices clearly took in their consideration of this case, they came to a wrong conclusion in deciding on the facts that this wife was justified in maintaining her uncompromising attitude, an attitude to which I have already drawn attention by quoting the words which she herself used in giving her evidence, and an attitude which she clearly adopted from the moment when she first heard of her husband's behaviour and which she has maintained ever since. I find myself unable to accept the proposition that this attitude on the part of the wife was a natural consequence of the husband's behaviour, so as to justify the conclusion that he must presumptively have intended to drive her out.

In those circumstances it seems to me that the finding of desertion cannot stand, and the order made by the justices ought to be set aside.

Barnard J. I entirely agree with what my Lord has said. Counsel for the wife relied very strongly on an old case, *Haswell* v. *Haswell and Sanderson*.[12] It is none the worse for being an old case. It was tried in 1859, only two years after the first Matrimonial Causes Act was passed, and we are now in 1954. The facts of that case were shortly these:—The marriage was a marriage between two very young people, a secret marriage. There was never any matrimonial home, and the husband in the case was in the habit of visiting his wife from time to time at her mother's house, and when he paid one of these visits he found his wife behaving indecently with another man. The other man was named, and he was known to the husband, and subsequently the wife committed adultery, not with that man but with the co-respondent in the case. There was no doubt about the adultery, and the only question that troubled the court was whether or not there was a discretionary bar to the decree. The court was asked by counsel appearing for the husband to consider section 31 of the Matrimonial Causes Act, 1857, which provided that the court was not bound to pronounce a decree if the petitioner had deserted or wilfully separated himself or herself from the other spouse without reasonable excuse.

---

[12] (1859) 1 Sw. & Tr. 502.

As I have already said, that case was tried in 1859, and certainly public opinion does not regard conduct of that nature so strictly today as it did 100 years ago. Public opinion then would certainly have regarded acts of indecency on the part of a wife with more stringency than those on the part of a husband. I think that it would be right to say that the law, so far as it can, where it is considering conduct, does try to keep abreast of public opinion. But be that as it may, the Judge Ordinary, in giving the judgment of the full court, concluded his judgment by saying this[13]: "It is not necessary for the court "to say that this would have justified him in turning her out of his "house; that it would have enabled him to resist an action of debt "for necessaries supplied to her; or would have been a sufficient answer "in a suit for restitution of conjugal rights. But the question is, "whether we are in a position to exercise a discretionary power. The "adultery has been fully proved, and we cannot say that the petitioner "comes within the description of a person 'wilfully separating himself "'without reasonable excuse'." In that case the two parties, the wife and the man, were both consenting parties, and it might well be that the husband in that case could have justified his conduct in having no more to do with his wife within the law as laid down in *Glenister* v. *Glenister*.[14]

But on the facts in this case the woman with whom the husband was found guilty of committing an indecent assault was not a consenting party, and there could never be any suggestion in the case that we are trying that the wife had any reasonable ground for believing that her husband had committed adultery. It seems to me that that really is the fundamental difference between *Haswell* v. *Haswell and Sanderson*[15] and the present case, and, of course, we are not deciding whether or not the wife, in leaving the house as she did, deserted her husband. That question is not before us.

For these reasons I think that *Haswell* v. *Haswell and Sanderson*,[15] which was so strongly relied upon by counsel for the wife, is not really

---

[13] 1 Sw. & Tr. 502, 505.

[14] [1945] P. 30; [1945] 1 All E.R. 513.

[15] 1 Sw. & Tr. 502.

1954

LEWIS v. LEWIS.

applicable to the case we have been considering; and I agree with my Lord that the appeal must succeed and the order made by the justices must be set aside.

Appeal allowed.

Solicitors: *Chamberlain & Co. for R. S. Bowen & Hopkin W. Evans, Port Talbot; K. S. Wehrle, Son & Maurice Sheehan, Port Talbot.*

J. B. G.

1955
June 17;
Nov. 9.

Karminski J.

DAVIES *v.* DAVIES.

Husband and Wife—Divorce—Practice—Rescission and substitution of decree—Application to rescind decree nisi and substitute decree of judicial separation—Discretionary power of substitution.

A wife who had obtained a decree nisi of divorce on the ground of adultery continued to live with the children of the marriage in the matrimonial home, where she acted as housekeeper to the husband. Fearing, however, that if the marriage were dissolved by decree absolute she and the children would be turned out, and in order to secure a home for them, she applied to the court for the rescission of the decree nisi of divorce and the substitution of a decree of judicial separation. The husband adopted a neutral attitude upon her application:—

Held, (1) that the test upon such an application must be this: Is there any reason, having regard to all the circumstances, why the court should not in its discretion alter the decree as prayed?

(2) That as the wife had not been shown to have had any improper motive, such as the exertion of financial pressure upon the husband, there was no reason for the court in its discretion to refuse her application, which should accordingly be granted.

Jeffrey v. *Jeffrey* [1951] P. 32; 66 T.L.R. (Pt. 2) 294; [1950] 2 All E.R. 449 distinguished.

SUMMONS for rescission of decree nisi of divorce and substitution of a decree of judicial separation.

The wife was granted a decree nisi of divorce in an undefended suit on the ground of adultery on April 30, 1954. At the time of the decree she was living with the husband and the three children of the marriage in the matrimonial home, a flat in a house owned by the husband; and she continued to live in the home after the decree and to act as a housekeeper for the husband, but no more. No sexual relations took place between the parties after the decree nisi had been pronounced.

The wife stated in her affidavit that she was afraid that if the decree nisi were made absolute the husband would quickly—if not at once—turn her out; and that she would then inevitably find difficulty in obtaining suitable accommodation for the children and herself. She desired, therefore, to be in a position where she and the children could not be compelled to leave their present home; and she stated that that was the reason why she had stayed on and acted as the husband's housekeeper. It appeared that the husband spent a good deal of his time away from home on business.

The summons was adjourned on June 17, 1955, for the assistance in argument by the Queen's Proctor.

The husband, who did not appear either at the original or the adjourned hearing, wrote a letter to the Queen's Proctor after the adjournment in which he adopted a wholly negative attitude, and said that he merely desired some sort of final decision. He stated that he was doing all he could and paying all the expenses; and he emphasized that there never had been and never could be any suggestion of the wife being asked to leave the flat, so far as he was concerned. He did not oppose the application.

K. Bruce Campbell for the wife. The wife had a right upon the adultery of her husband to present a petition either for a judicial separation or a divorce; and although she originally prayed for a decree of divorce, she desires to have the decree nisi rescinded and a decree of judicial separation substituted, so that she and the children may have a secured home; as a wife she will have rights there, but on a divorce the husband could, if he wished, turn her out as a stranger.

Jeffrey v. *Jeffrey*[1] is to be distinguished, for the husband respondent in that case had opposed the wife's application to substitute a decree of judicial separation for a decree nisi of divorce and, relying upon section 183 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925,[2] had asked the court in its discretion to make the decree nisi absolute. The rights of the guilty party under the present subsection, section 12 (3) of the Matrimonial Causes Act, 1950, are not invoked in this case. In cases such as *Parsons* v. *Parsons*,[3] *Griffiths* v. *Griffiths*[4] and *Daglish* v. *Daglish*[5] the court would appear to have taken the view prior to the 1937 Act that a spouse had a right to have an application such as the present one granted; and it is submitted that in the absence of an opposing application by the guilty spouse for the decree nisi to be made absolute those cases should be followed, and that a spouse still has a right to have a decree of judicial separation substituted.

---

[1] [1951] P. 32; 66 T.L.R. (Pt. 2) 294; [1950] 2 All E.R. 449.

[2] Supreme Court of Judicature (Consolidation) Act, 1925, s. 183 (4) (added to the Act by s. 9 of the Matrimonial Causes Act, 1937): "Where "a decree nisi has been obtained, "whether before or after the passing "of this Act, and no application for "the decree to be made absolute has "been made by the party who obtained "the decree, then, at any time after "the expiration of three months from "the earliest date on which that party "could have made such an applica-"tion, the party against whom the "decree nisi has been granted shall "be at liberty to apply to the court "and the court shall, on such applica-"tion, have power to make the decree "absolute, reverse the decree nisi, "require further inquiry or otherwise "deal with the case as the court "thinks fit." (The section has been re-enacted in s. 12 (3) of the Matrimonial Causes Act, 1950.)

[KARMINSKI J. Might not the wife have sought relief under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949?]

Such an order, if obtained, would have ceased to have effect after three months: Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4). [*In re Blanchard*[6] and *Lewis* v. *Lewis*[7] were also referred to.]

James Comyn for the Queen's Proctor. The power of the court upon such an application is discretionary, and upon the authorities considered in the light of the legislation now existing the test should be this: Is there really any reason, after considering the facts, why the court should not exercise its discretion in favour of the application to alter the relief? There is no such reason here. Investigations made into the facts show that there is no question as to the propriety of the finding of adultery, and that the respondent himself is completely indifferent to the result of this application, and that there is no question of it being made with an improper ulterior motive.

The husband did not appear and was not represented.

KARMINSKI J. stated the facts substantially as set out above, and said that the husband's failure to oppose the application was a matter of some importance. His Lordship continued: There can be no doubt, I think, in law that if this decree is made absolute the wife—who then will be the former wife—will have no rights to continue to reside in this flat, and will be, to that extent at least, at the mercy of the husband.

When this case came before me I felt that it might be a matter of some difficulty; I therefore asked that the Queen's Proctor should be represented to argue on any question of law which he might desire to put forward, and once again I am indebted to Mr. Comyn for helping the court. I think that on a further examination of the law this case is not, perhaps, of such difficulty as it might have appeared to have been. This is a case where the wife says, quite frankly, "I do not much care whether "I am divorced or not. What I really want is to be safeguarded "so far as the occupancy of this flat (which is my home) is "concerned."

---

[3] [1907] P. 331; 23 T.L.R. 749.
[4] (1912) 28 T.L.R. 281.
[5] [1936] P. 49; 52 T.L.R. 171.
[6] (1932) 48 T.L.R. 402.
[7] [1892] P. 212; 8 T.L.R. 489.

I ventured to suggest in argument that she could possibly have sought relief from the justices under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, though Mr. Campbell reminded me that an order made by the justices would not have been effective if she had continued to live in the same house as the husband. I do not think that there would have been any difficulty if the wife had originally applied for maintenance under section 23 of the Matrimonial Causes Act, 1950; but this is a case where she originally asked for dissolution and has, indeed, obtained a decree nisi of dissolution, and now regrets her choice. There is no doubt that if she had originally petitioned for a decree of judicial separation in this case on the ground of her husband's adultery she would have obtained such a decree. Indeed, I can see no reason, on the facts so far as I know them, why the court could have refused a decree of judicial separation; but in fact she chose the other course, and now seeks to have that altered for the reasons I have indicated.

Mr. Comyn, for the Queen's Proctor, made it clear that the Queen's Proctor, having made the usual inquiries, was quite satisfied with the grounds advanced for the petition for dissolution, and he suggested that the real test in matters of this kind is really this: Is there any reason, having regard to all the circumstances of this particular case, why the court should not alter the decree granted in April of last year to the wife? Mr. Comyn said that, in the view of the Queen's Proctor, there were no grounds here on which the court could refuse to do so.

Quite clearly, I think the court has a discretion in an application of this kind to grant or refuse the application, though the discretion must, of course, be exercised judicially.

My attention was called, originally by Mr. Campbell, and subsequently by Mr. Comyn for the Queen's Proctor, to a decision of Pearce J. in *Jeffrey* v. *Jeffrey*.[1] That was a case where a wife had obtained a decree nisi of dissolution and, as here, made application subsequently for a decree of judicial separation in lieu of the decree nisi of dissolution. At the same time the respondent husband made an application that the decree nisi should be made absolute under what was then section 183 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, as added by section 9 of the Matrimonial Causes Act, 1937, which has now been re-enacted in section 12 of the Matrimonial Causes Act, 1950. Pearce J., therefore, had both applications before him, the one to rescind the decree nisi and to substitute a decree of judicial separation, and the other to make the decree nisi absolute.

---

[1] [1951] P. 32; 66 T.L.R. (Pt. 2) 294; [1950] 2 All E.R. 449.

It was clear that Pearce J. regarded [2] some of the reasons advanced by the petitioner wife in that case, especially those dealing with conscience, as lacking in substance, and he made it clear [3] that the wife's underlying motive in making the application before him was that she was disappointed with the husband's financial state, and thought that it would pay her better to remain his wife, so that if she survived him she might have a chance of making a successful application under the Inheritance (Family Provision) Act, 1938, in the capacity or status of a widow.

In dealing with the principles of the matter Pearce J. said [4]: "It is obviously undesirable to allow a petitioner to use "delay or alteration in a decree nisi of divorce in order to put "pressure on a respondent husband and to secure from him a "financial advantage. There may be certain circumstances "where justice is better served by altering a decree nisi of "dissolution to a decree of judicial separation. The judge has a "complete discretion under the new subsection [Supreme Court "of Judicature (Consolidation) Act, 1925, s. 183 (3)], and the "manner in which that discretion should be exercised must "depend entirely on the circumstances of the particular case."

I would add respectfully that I agree entirely with what Pearce J. said there. I have no doubt that this court has a complete discretion, and that the manner in which that discretion should be exercised must depend in each case on its particular facts.

In this case I am satisfied that the wife has put her reasons fully and properly before the court. She says, in terms, "What "I want is to secure the home for myself and the children." This is not a case in which there is any suggestion (as there was

---

[2] [1951] P. 32, 34.

[3] Ibid. 34–35.

[4] Ibid. 34.

1955
Davies
v.
Davies.
Karminski J.

in *Jeffrey* v. *Jeffrey*[5]) that the wife, by making such an application, was putting some pressure of a financial kind on the respondent husband. Any such suggestion is, happily, lacking in this case. The husband here, unlike the husband in *Jeffrey* v. *Jeffrey*,[5] has made no cross-application for the decree to be made absolute. He appears to have adopted a wholly neutral attitude in this dispute.

In my view the test suggested by Mr. Comyn, on behalf of the Queen's Proctor, is the right one, and I ask myself this question: Is there really, after considering the facts, any reason why the court should not exercise its discretion in favour of this petitioning wife to alter the relief to be granted to her by this court in the way in which she requires it? Having considered the matter, with assistance from both counsel, I must answer the question in this way: I can find no grounds on which, exercising the discretion judicially, I can refuse the present application. I therefore grant it.

Decree nisi rescinded.
Decree of judicial separation.

Solicitors: *The Law Society, Divorce Department* (*G. E. C. Dougherty*); *The Queen's Proctor.*

J. B. G.

---

[5] [1951] P. 32.

MARCZUK *v.* MARCZUK.

1955
Oct. 26, 27;
Nov. 16.

Lord Merriman P. and Barnard J.

C. A.

1956
Feb. 2, 3, 6;
Mar. 6.

Singleton, Hodson and Romer L.JJ.

Husband and Wife—Maintenance—Justices—Adultery by wife—Condonation by husband—Ground for revocation of order—Resumption of cohabitation—Sexual intercourse on Saturday evenings—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39) (*as amended*), *ss.* 6, 7.

Statute—Construction—Expressio unius exclusio alterius. Statute—Construction—Re-enactment of section.

A wife left her husband and, in September, 1954, obtained a justices' order against him. She committed adultery on May 8, 1955, and that night he condoned that adultery:—

Held by the Court of Appeal (Hodson L.J. dissenting), reversing the decision of the Divisional Court, that, notwithstanding the condonation of her adultery, the order must be revoked under section 7 of the Summary Jurisdiction (Married Women) Act, 1895,[1] since the wording of section 7 must be contrasted with that of section 6, and the word " adultery " in section 7 must be read in its ordinary meaning, videlicet, sexual intercourse by the wife with a man other than her husband.

Ruther v. *Ruther* [1903] 2 K.B. 270 applied.

Per Romer L.J. Parliament is assumed to know the law.

APPEAL by a wife from an order of the justices of the petty sessional division of Paignton, sitting at Paignton on June 28, 1955, whereby they revoked, on the ground that she had subsequently committed adultery, an order made in her favour on September 8, 1954. There was no finding upon an alleged resumption of cohabitation since the making of that order.

The parties were married on January 25, 1950, the husband being a Pole by nationality. They lived together at all material times at 149, Winner Street, Paignton, and there was one child of the marriage, a girl born on March 21, 1950.

The wife left the matrimonial home early in September, 1954, and took out a summons on the ground that the husband had wilfully neglected to provide her and the child with reasonable maintenance. At the hearing of that summons she alleged that she left the husband because of his sexual demands. The Paignton justices found the case proved, and ordered the husband to pay the wife £3 a week for herself and £1 a week for the child, of whom the wife was granted custody. There was no appeal from that order.

The husband later issued a summons for the revocation of the order on two grounds: first, that there had been a resumption of cohabitation between about November 8, 1954, and March 21, 1955, and second, that on or about May 8, 1955, and on divers dates thereafter, the wife committed adultery with a man unknown.

---

[1] Summary Jurisdiction (Married Women) Act, 1895, as amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 6: " No orders shall be made under " this Act on the application of a " married woman if it shall be proved " that such married woman has com- " mitted an act of adultery: Provided " that the husband has not condoned, " or connived at, or by his wilful " neglect or misconduct conduced to " such act of adultery."

S. 7: " . . . If any married woman " upon whose application an order " shall have been made under this " Act . . . shall voluntarily resume " cohabitation with her husband, or " shall commit an act of adultery, " such order shall upon proof thereof " be discharged.

" Provided that the court may, if " the court think fit—

" (*a*) refuse to discharge the order " if, in the opinion of the court, such " act of adultery as aforesaid was " conduced to by the failure of the " husband to make such payments as " in the opinion of the court he was " able to make under the order; . . ."

The only evidence in support of the husband's charges of adultery was that of the husband himself, and at the close of his case the wife's solicitor submitted that there was no case to answer; but that submission was overruled. After the wife had given evidence on her own behalf and closed her case without calling any other witnesses, the court adjourned the hearing until June 28, 1955, in order that the unknown man with whom the wife had been charged with committing adultery might be called as a witness, since it appeared from the wife's evidence that she was able to identify him. The man, who proved to be one Radford, was called on her behalf as a witness at the adjourned hearing and denied the allegation of adultery.

The following summary of the evidence given upon the summons to revoke is taken from the judgment of the court:—

The husband in his evidence said that shortly after the order had been made he met his wife by chance, and that she said in the course of conversation that one day she would come back, and that, thereafter, she commenced to visit him on Saturday evenings at 149, Winner Street, arriving about 9 p.m. and leaving between 11 p.m. and 12 midnight, and that these regular visits continued until March 21, 1955, when they ceased after a row. He further said that on these occasions he paid her money and they had sexual intercourse, but that on some occasions he had no money to give her, and on those occasions she sometimes allowed him to have sexual intercourse with her and sometimes not.

The wife, on the other hand, stated in her evidence that she only visited her husband four times after she left, and that no sexual intercourse took place.

The husband further maintained that he next saw his wife on the evening of May 8, 1955, at the Falcon Inn, with a man, who later proved to be Radford, that they left the inn separately, and that he then spoke to his wife, who told him that she was waiting for someone and that she was in love with him; and when he threatened to stop her money she said that she would go and live with the man because she was in love with him. The husband noticed that when his wife left him after the conversation she walked in the same direction as Radford. He eventually followed her, and saw her again meet Radford at 9.45 p.m.; he followed them both and saw them enter Torre Station Woods, when he left them and went home. After 11 p.m. that same night his wife again visited him, and he noticed her muddy shoes. She again told him that she was in love, and took out a photograph and said: "Look, I'm happy here," and when her husband wanted to see it she tore it in half and gave him the half showing herself only, but with a man's arm round her, putting the other half in her handbag. The husband produced the torn half given him by his wife at the hearing together with a copy of the complete photograph showing the wife and Radford together. The wife went on to say that she wanted a divorce, and that if he did not believe her she would put it in writing, which she subsequently did, and the husband produced this note at the hearing. When the husband accused her of having been in the woods, she said that she had been standing in the woods and talking to her friend, with whom she was in love. The husband said that his wife was in a temper and that there was an angry scene, but that after a time she calmed down, and later asked him for money. He said that he gave her 10s., and that after that they went to bed and settled down, and later she went home. Counsel for the husband conceded the fact that this evidence meant that they had sexual intercourse as on the earlier occasions between November, 1954, and March, 1955. On a later occasion, on June 4, 1955, the husband saw his wife with Radford in company with another man and woman in Torquay, and later that night he again saw his wife sitting on a seat with Radford at Paignton, although he did not appear to have recognized the man as Radford; after that date he ceased to make payments under the justices' order. The wife in her evidence admitted that she was sitting on the seat with Radford, and that they had been cuddling. Both the wife and Radford denied that they had committed adultery; and the wife denied that she had ever told her husband that she was in love with Radford, but she admitted that she was infatuated with him. She also admitted that she had known Radford for 9 to 10 weeks, and had met him once or twice a week.

Both the wife and Radford admitted that they had met on the evening of May 8, 1955, but not at the Falcon Inn, and both denied that they had been to Torre Station Woods. Their story was that they went in the opposite direction, hired a taxi from the rank and drove to Torquay sea front, and then went under Cockington Railway Arch for a talk. In cross-examination the wife was a little vague about this arch, and was unable to explain how she got mud on her shoes if she had stood there with Radford either on the pavement or the tarmac road, details about which the court would have local knowledge. Radford

1955

MARCZUK v. MARCZUK.

in cross-examination was most evasive when asked about the torn photograph.

The justices, after hearing the evidence in support of both the allegation of adultery and the allegation that cohabitation had been resumed, found the charge of adultery proved and revoked the order of September 8, 1954. Having made up their minds upon the issue of adultery they did not hear argument as to the alleged resumption of cohabitation.

The wife appealed to the Divisional Court.

G. R. King Anningson for the wife. There was no sufficient proof of adultery; in holding to the contrary the justices misdirected themselves and failed to give proper weight to the decision in *England* v. *England*,[1] which emphasized that suspicion of adultery, however compelling, does not necessarily amount to proof. Should the court not accept the above submission, it is desired to argue the points as to condonation and resumption of cohabitation, which then arise, as amicus curiae since the wife continues to deny that adultery or sexual intercourse with her husband took place after she left the matrimonial home.

As to condonation, it is submitted that a single act of sexual intercourse by a husband is by itself conclusive evidence of condonation and that the law to this effect is well established. [Reference was made to *Cramp* v. *Cramp and Freeman*,[2] *Keats* v. *Keats and Montezuma*,[3] *Henderson* v. *Henderson and Crellin*,[4] *Perry* v. *Perry*[5] and *Swan* v. *Swan*.[6]] The reason has been said to be the extreme prejudice which a wife may suffer as the result: *Tilley* v. *Tilley*.[7]

On their true construction the words "an act of adultery" in section 7 of the Summary Jurisdiction (Married Women) Act, 1895, must mean an act of adultery on which the husband is entitled to rely. If one examines the law as to a wife's adultery which was in force in 1895 it is found that, in all branches, a wife did not lose her rights by reason of adultery which had been condoned by her husband. The law as to a wife's right at common law to pledge her husband's credit for necessaries is summarized in Lush on Husband and Wife,[8] and it is there set

---

[1] [1953] P. 16; [1952] 2 T.L.R. 705; [1952] 2 All E.R. 784.

[2] [1920] P. 158; 36 T.L.R. 333.

[3] (1859) 1 Sw. & Tr. 334.

[4] [1944] A.C. 49; 60 T.L.R. 113; [1944] 1 All E.R. 44.

[5] [1952] P. 203; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076.

[6] [1953] P. 258; [1953] 2 All E.R. 854.

[7] [1949] P. 240; 65 T.L.R. 211; [1948] 2 All E.R. 1113.

[8] 4th ed., p. 331.

1955

MARCZUK
v.
MARCZUK.

out that although she loses this right if she commits adultery she does not do so if the adultery is condoned. *Wilson* v. *Glossop*, both in the Divisional Court [9] and on appeal,[10] is authority for that proposition. Neither according to ecclesiastical law nor in the divorce jurisdiction is a husband entitled to rely upon adultery at which he has connived or which he has condoned. It is submitted that the Act of 1895 was enacted with the existing law in mind and that the legislature never intended that a wife's adultery should be an absolute bar to the continuance of an order in her favour irrespective of the conduct of the husband. If this were so the anomalous situation would arise that while the divorce court would be bound to dismiss a husband's petition on the ground of adultery which he had connived at or condoned, he would have no difficulty in obtaining from the justices the discharge of an order which the wife had obtained against him prior to her adultery. Such an absurd state of affairs cannot have been intended. It is true that in *Ruther* v. *Ruther* [11] it was held that, where the husband by his conduct in failing to comply with the terms of an order made against him conduced to the subsequent adultery of the wife, he was entitled to have an existing order discharged; but that case said nothing as to condonation and can thus be distinguished from the present case.

In any event, the proviso added to section 7 by section 2 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, got rid of the decision in *Ruther* v. *Ruther* [11]; that was the sole purpose of the subsection, and the fact that it does not refer in terms to connivance at and condonation of adultery does not mean that those acts had no effect upon the right to discharge an order given to a husband by that section: see *Read* v. *Read*,[12] in which, although the court was not called upon to decide the point under consideration, it was said that an absolute and unqualified construction of that proviso would lead to a strange result.[13] The court cannot read into section 7 of the Act of 1895 the proviso existing in section 6, as it was asked to do in *Ruther* v. *Ruther* [14]; nor is it necessary to do so, for it is submitted that in view of the well-established rules of common law, ecclesiastical law and divorce law as to adultery any special words in the statute were redundant. The reason for the insertion of an express proviso in section 6 may well have been that the legislature thought fit to remove from the justices the difficult task of exercising their discretion as to conduct conducing, which was merely a discretionary bar according to the existing law, and that, once words referring to conduct conducing had been inserted in the statute, it was thought wise to deal specifically with connivance at and condonation of adultery lest the maxim expressio unius est exclusio alterius be thought to apply.

---

[9] (1887) 19 Q.B.D. 379, 381.

[10] (1888) 20 Q.B.D. 354, 356.

[11] [1903] 2 K.B. 270.

[12] [1952] P. 119; [1952] 2 T.L.R. 1086.

[13] [1952] P. 119, 121.

[14] [1903] 2 K.B. 270, 274, 276.

It is submitted that there was no resumption of cohabitation. There was no incident of married life between the parties in the present case except occasional sexual intercourse, and it is contrary to common sense to say that merely because persons have sexual intercourse intermittently they are cohabiting. The concept of cohabitation involves much more than sexual intercourse; even residence under the same roof is not enough: *Thomas* v. *Thomas* [15] and *Evans* v. *Evans*.[16] To constitute a resumption of cohabitation there must be a bilateral intention to live together in a home with all the incidents of married life attaching to such living together: *Perry* v. *Perry*.[17] The present case is distinguishable on its facts from *Abercrombie* v. *Abercrombie*,[18] for in that case the parties were separated by force of circumstances beyond their control, but there was a matrimonial relationship apart from a merely sexual one, and the spouses cohabited so far as it was possible in all the circumstances.

Philip Goodenday and *David Sullivan* for the husband. The conduct of the husband in this case did not amount to condonation of the adultery. His evidence, which was accepted by the justices, was that, after the discovery of the facts from which the court inferred adultery, his wife visited his home, that he gave her 10s., that then they went to bed and had intercourse, and that the wife did not stay the night but left to return to her own home. It is true that there are dicta in *Henderson* v. *Henderson and Crellin*,[19] *Viney* v. *Viney* [20] and *Perry* v. *Perry* [21] to the effect that sexual intercourse after knowledge of the adultery is conclusive evidence against the husband that he has forgiven and reinstated the wife. In each of those cases, however, there was an element of cohabitation, and it is submitted that in the total absence of that element, as was the fact in the present

---

[15] [1948] 2 K.B. 294; 64 T.L.R. 377; [1948] 2 All E.R. 98.

[16] [1948] 1 K.B. 175; 63 T.L.R. 638; [1947] 2 All E.R. 656.

[17] [1952] P. 203.

[18] [1943] 2 All E.R. 465.

[19] [1944] A.C. 49.

[20] [1951] P. 457; [1951] 2 T.L.R. 705; [1951] 2 All E.R. 204.

[21] [1952] P. 203.

1955

MARCZUK
v.
MARCZUK.

case, sexual intercourse is not necessarily sufficient. It is submitted, for instance, that if one takes the hypothetical case of a wife living apart from her husband and pursuing a calling as a prostitute with whom the husband, in fact, has sexual intercourse on one occasion, but pays her as a prostitute, that act would not amount to reinstatement of the wife so as to constitute condonation.

Even if it be held that the conduct of the husband did amount to condonation, it is further submitted that condonation of the wife's adultery does not affect the rights of a husband under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended, for the section makes no provision that the right to have a maintenance order revoked is lost or in any way affected by the husband's condonation. The section is clear and unambiguous in its terms and creates an absolute right to discharge in the event of the wife's adultery. The court should, in these circumstances, give effect to the clear meaning of the words and not seek to qualify them. Reliance is placed on the rule referred to by Lord Greene M.R. in *In re a Debtor* (*No.* 335 *of* 1947)[22]: "If there is one rule of construction for statutes and "other documents it is that you must not imply anything in "them which is inconsistent with the words expressly used."

Section 7 of the Act must be contrasted with section 6, in which there is an express proviso as to conduct conducing, condonation and connivance. Had the legislature intended to give a similar effect to section 7 it could have enacted a similar proviso. This consideration formed the basis of the decision in *Ruther* v. *Ruther*,[23] as is clear from the argument of counsel in that case[24]: see also the judgment of McCardie J. in *Wickins* v. *Wickins* (*No.* 2).[25] Although the point was expressly left open in *Read* v. *Read*,[26] it is submitted that, in view of the plain meaning of section 7, no distinction is to be drawn between conduct conducing, which is a discretionary bar, and condonation. Section 2 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, added an express limited proviso to section 7 of the Act of 1895, thereby recognizing that no other proviso was to be implied.

The cases relating to dissolution of marriage, judicial separation and other matrimonial matters do not assist on the present point because the rights provided by section 7 of the Act of 1895 were then created for the first time purely as the creatures of statute. Similarly, for the same reason, the common law cases on the right of a wife to pledge her husband's credit do not assist. The court should not depart from the plain meaning of the Act.

---

[22] (1948) 64 T.L.R. 446; [1948] 2 All E.R. 533.

[23] [1903] 2 K.B. 270, 276.

[24] Ibid. 274.

[25] [1918] P. 282, 284; 34 T.L.R. 568.

[26] [1952] P. 119.

As to whether a resumption of cohabitation took place, it is conceded that (1) one or two acts of sexual intercourse do not raise an irrebuttable presumption that cohabitation has been resumed, although such acts are strong evidence of resumption (see *Thomas* v. *Thomas*,[27] *per* Lord Goddard C.J.), and (2) a mutual or bilateral intention to resume cohabitation must be shown in addition to the mere fact of cohabitation. These propositions follow from *Rowell* v. *Rowell*[28] and *Perry* v. *Perry*,[29] but, as to the fact of cohabitation, it is not necessary to show that a full matrimonial relationship has been resumed: *Abercrombie* v. *Abercrombie*.[30] It is necessary only to show that "a state of "affairs" has been resumed which could amount to having a matrimonial home. In that case the parties had corresponded with one another, had had sexual intercourse on only four occasions and had spent one week-end together. In the present case the acts of intercourse continued regularly at weekly intervals for five or six months. In *Perry* v. *Perry*[31] there had been only two or three acts of intercourse. As to the parties' intentions, in *Perry* v. *Perry*[31] the commissioner had found as a fact that the wife had never lost her animus deserendi, but in the present case there is no such finding; it is submitted that from the facts adduced in evidence the court should infer that each party at the material time intended to resume cohabitation if only in a partial sense.

Cur. adv. vult.

Lord Merriman P., reading the judgment of the court, referred to the course of the proceedings before the justices, rejecting the argument of counsel for the wife that the submission of no case made before the justices should have been upheld, and continued: Although it is out of chronological order, we propose to deal first with the justices' finding that the wife committed adultery, and with the implications of that finding.

It is argued that the statement of their reasons shows that the justices misdirected themselves in placing the burden of proof on the wife, inasmuch as they say that a prima facie case of guilt had been raised which they were not satisfied had been rebutted by the evidence tendered by the wife and on her behalf. It is also argued that the adjournment, apparently at the instance of the justices themselves, in order that evidence might be given by Radford, with whom she was alleged to have committed adultery, was consistent with this view of the matter.

---

[27] [1948] 2 K.B. 294, 297.
[28] [1900] 1 Q.B. 9; 16 T.L.R. 10.
[29] [1952] P. 203.
[30] [1943] 2 All E.R. 465.
[31] [1952] P. 203.

In our opinion the statement of the justices' reasons is open to criticism in respect of the onus; for, of course, the burden of proof remained throughout upon the husband, and the justices should have directed themselves that the question was whether, upon the evidence as a whole, including that of the wife and Radford, the husband had satisfied them that the charge of adultery was proved.

On the other hand, it is right to note that the attention of the justices was called to several authorities dealing with the onus of proof, in one of which, *Churchman* v. *Churchman*,[1] the Court of Appeal called attention to the point that ". . . the "incidence of the burden of proof as a determining factor of "the whole case is only of importance if the tribunal finds the "evidence, pro and con, so evenly balanced that it can come "to no definite conclusion. Then the onus will determine the "matter. But if the tribunal, after hearing and weighing the "evidence, comes to a determinate conclusion, the onus has "nothing to do with it and need not be further considered (*per* "Lord Dunedin in *Robins* v. *National Trust Company*[2])."

Moreover, they were also referred to *England* v. *England*,[3] where it was held that although the combination of mutual attraction and opportunity was strong prima facie evidence that adultery had been committed, that evidence could be contradicted, and that there was nothing in the nature of an irrebuttable presumption that adultery had been committed.

As to the adjournment to enable Radford to give evidence—it is true that there is no provision in the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, for obliging the husband to make the man, with whom he alleges the wife to have committed adultery, a party. But this does not affect the consideration that the man must always be an important witness. Apart from the fact that it is only fair that he should have an opportunity of answering an allegation of adultery which may have serious consequences for him, Radford's evidence might have proved decisive in favour of the wife. We do not think that this criticism of the justices is well founded.

---

[1] [1945] P. 44, 52; 61 T.L.R. 464; [1945] 2 All E.R. 190.

[2] [1927] A.C. 515, 520; 43 T.L.R. 243.

[3] [1953] P. 16; [1952] 2 T.L.R. 705; [1952] 2 All E.R. 784.

There remains, however, the question whether any substantial wrong or miscarriage of justice has been occasioned by the misdirection; for by rule 71 (6) of the Matrimonial Causes Rules, 1950, ". . . No appeal shall succeed on the ground merely of "misdirection . . . unless, in the opinion of the court, substantial "wrong or miscarriage of justice has been thereby occasioned in "the court below."

It is, in our opinion, clear that the justices appreciated the point that the proof of adultery in this case depended, not upon direct evidence, but upon proof of what they call "a strong "inclination, combined with the opportunity, to commit adultery."

As to the inclination, the wife admitted that she was "infatuated with" Radford but "would not say she was 'in "'love' with him."

As to the opportunity, there was an acute conflict of evidence. The justices accepted the husband's evidence, and did not believe the alibi put forward by the wife and Radford, whose evidence they say was, in certain important points, contradictory.

In our opinion it is clear that after hearing and weighing the evidence the justices, in Lord Dunedin's words,[4] came to a determinate conclusion and the onus need not be further considered.

[His Lordship reviewed the evidence as set out above and continued:] By way of criticism of the justices' reasons it was also pointed out that as evidence of the husband's belief that the wife had committed adultery on May 8, 1955, they say that he ceased as from that date to make her any further payments under the maintenance order; whereas he had said that the payments were not stopped until June 4, 1955. But the husband stated that he stopped the payments after seeing the wife and Radford together in Torquay on June 4, 1955, albeit he did not identify Radford as the man with whom she was sitting that evening on a seat in Paignton. The error of recollection on the part of the justices, therefore, does not seem to be of great importance.

A more important point, perhaps, is that the significance of the fact that sexual intercourse between husband and wife took place on May 8, 1955, appears to have escaped the attention of the justices, not only as to condonation but also in relation to the credibility of the husband about the earlier events of that evening.

---

[4] [1927] A.C. 515, 520.

Nevertheless, we have come to the conclusion that there was ample evidence before the justices, if they accepted it, as they did, to justify a finding of adultery on May 8, 1955. Even if the justices misdirected themselves about the onus of proof, and have not fully appreciated the evidence in the respects we have just mentioned, we do not think that we ought to interfere with their finding.

The real difficulty begins on the assumption that the finding of adultery cannot be disturbed.

Two questions arise. First: has the husband condoned the adultery of which he complains? and, secondly: if so, what, if any, effect has such condonation on the operation of that part of section 7 of the Act of 1895?—under which this application is made.

It is right that we should say at once that the question of condonation does not appear to have been raised before the justices, and arose in this court in the most casual way. When we heard, at the outset, that the wife was appealing against a finding that she had committed adultery since the making of the order, we naturally inquired whether divorce proceedings had already been taken or were contemplated, for, if so, we should in the ordinary course have adjourned the appeal to enable that issue to be tried by a judge with the advantage of seeing and hearing the witnesses, instead of by this court on a paper record of the evidence. We were told that there were no proceedings, and counsel for the wife added the comment that it was unlikely that there would be, because the husband had condoned the alleged adultery. Naturally he was anxious not to weaken the wife's case that the finding of adultery was entirely unjustified by contending that the adultery had been condoned. This, of course, did not absolve this court from considering this issue. Accordingly, without prejudice to the main contention, and at the request of the court, we had the benefit, after an adjournment, of a very helpful argument from counsel on both sides on the issue of condonation and its bearing on the right of the husband to rely on the act of adultery on which this application was based.

As to question 1, it was, as already stated, admitted that the evidence of the husband about the evening of May 8, 1955, read in the light of his evidence of earlier visits, means that the husband and the wife had sexual intercourse, and that she left directly afterwards. Nor is it disputed that when this occurred the husband knew all that there was to be known about the alleged act of adultery. According to the evidence already referred to she had admitted guilty affection for the man in question, and had said that she intended to go to him if the husband did not fulfil his obligations under the order. The evidence of opportunity to indulge that affection on the evening of May 8, 1955, was provided by the husband himself, and was accepted by the court. There was, it is true, some evidence of a continuation of the association thereafter, but without any evidence from which a later act of adultery could be inferred. That being so, there is, in our opinion, no substance in the argument that as the husband's complaint of the wife's adultery alleges that it occurred on May 8, 1955, "and thereafter"—that is to say, up to the date of the summons—the justices may have found adultery between May 8, 1955, and the date of the summons, which, being unknown to the husband, could not have been the subject of condonation.

The argument against condonation on the part of the husband was directed chiefly to distinguishing the case from *Henderson* v. *Henderson and Crellin.*[5] We were invited to say that, against a husband, sexual intercourse is only decisive of condonation if it takes place as an incident in the reinstatement of the wife; whereas, it was argued, the events of the evening of May 8, 1955, could not possibly be so described, even if they were related to the similar incidents which occurred before March 21, 1955.

In our opinion this argument is inconsistent with the following passage in the opinion of Viscount Simon L.C. in *Henderson* v. *Henderson and Crellin*[6]: "The essence of the matter is (taking "the case where it is the wife who has been guilty of the "matrimonial offence) that the husband with knowledge of the "wife's offence should forgive her and should confirm his forgive- "ness by reinstating her as his wife. Whether this reinstatement "goes to the length of connubial intercourse depends on circum- "stances, for there may be cases where it is enough to say that "the wife has been received back into the position of wife in the "home, though further intercourse has not taken place, but "where it has taken place, this will, subject to one exception, "amount to clear proof that the husband has carried his forgive- "ness into effect."

---

[5] [1944] A.C. 49; 60 T.L.R. 113; [1944] 1 All E.R. 44.

[6] [1944] A.C. 49, 52.

1955

MARCZUK
v.
MARCZUK.

The exception of the case where the intercourse has been induced by a fraudulent misstatement of fact by the wife is irrelevant here. But the very fact that Viscount Simon L.C. regarded this as the sole exception emphasizes his opinion that where intercourse has taken place, it amounts to clear proof that the husband has carried forgiveness into effect. This leaves no room for argument whether or not the sexual intercourse was incidental to reinstatement of the wife. It is held to be conclusive of the reinstatement. It is quite clear that in *Perry* v. *Perry*[7] this was the view of the Court of Appeal as to the effect of *Henderson* v. *Henderson and Crellin.*[8] In laying down that, with the question whether there had been condonation on the part of the injured spouse intention has nothing to do, Sir Raymond Evershed M.R. said[9]: "As the House of Lords "decided in *Henderson* v. *Henderson and Crellin*,[10] sexual inter-"course is conclusive proof of condonation of adultery by a "husband who has knowledge of the adultery and, in the absence "of fraud by the wife, whatever may have been in fact the "intention of either spouse." (See also the passage in the judgment of Jenkins L.J.,[11] which is quoted in full later.[12])

With regard to the second question—that is to say: what, if any, is the effect of condonation in this case?—the difficulty arises out of the fact that in two consecutive sections of the Act of 1895 proof that a married woman has committed an act of adultery is dealt with in different ways. Section 6, which limits the powers of the court to make any of the orders under the Act in favour of a married woman who has committed an act of adultery, includes the express proviso that the husband has not condoned or connived at or by his wilful neglect or misconduct conduced to such act of adultery; whereas section 7, which deals with the power of the court to vary or discharge an order, enacts that "If any married woman upon whose application an order "shall have been made under this Act . . . shall commit an "act of adultery, such order shall upon proof thereof be dis-"charged"—but without any qualification about connivance in, condonation of, or conduct conducing to such act of adultery. That section has been amended by section 2 (1) (*a*) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, whereby the proviso is introduced that the court may, if it thinks fit, refuse to discharge the order if, in its opinion, such act of adultery as aforesaid was conduced to by the failure of the husband to make such payment as in the opinion of the court he was able to make under the order.

---

[7] [1952] P. 203; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076.

[8] [1944] A.C. 49.

[9] [1952] P. 203, 214.

[10] [1944] A.C. 49.

[11] [1952] P. 203, 222.

[12] See note 30, post, 235.

This, it is suggested, leaves the whole area of conduct conducing to an act of adultery since the making of an order, and connivance at and condonation of such act of adultery, unqualified except by the express proviso itself.

Accordingly, it was argued for the husband that to introduce the qualification that the husband was barred from relying on the act of adultery in question if he had either connived at or condoned it, offended against the principle that it is not legitimate to insert words contrary to the plain meaning of a statute.

Mr. King Anningson, for the wife, on the other hand, by way of illustrating the extreme absurdity of this result, gave the following example: A wife who is in possession of an order under the Act commits an act of adultery, but instead of making an application to discharge the order under section 7, the husband brings a petition for divorce on that ground, on the hearing of which it is found that she has committed adultery, but that the husband had both connived at and subsequently condoned the act in question, the court would be bound to dismiss his petition for divorce, while at the same time, if the husband applied to revoke the order on the ground of the same act of adultery, the justices would have no option but to do so.

Counsel for the husband did not shrink from supporting this view of the statute, and relied on the decision in *Ruther* v. *Ruther*,[13] which was followed by this court in *Read* v. *Read*,[14] where it was recognized that the proviso in the amending Act of 1925 appeared to limit the area of conduct conducing which could be relied on to defeat the husband's right under section 7.

From this he argued that, if it is impossible to import any other kind of conduct conducing to an act of adultery from section 6 to section 7, it is difficult to see how it is legitimate to import connivance at or condonation of adultery from one section to the other.

This view of the effect of *Read* v. *Read* [15] seems to be reflected in Rayden on Divorce,[16] but we would point out that in the judgment of this court [17] it was said that if the concluding sentence of section 7, as amended by the proviso added in 1925, is intended to be absolute and unqualified, it leads apparently to the strange result that the husband can take advantage of an act of adultery which he himself has contrived and connived at for the very purpose of getting rid of the order; but we added [18]: " . . . in "this case it is neither necessary nor desirable, in our opinion, "to consider the construction of this section in relation to matters "which would be absolute bars to a petition for divorce on the "ground of adultery. We are concerned solely with the question "of conduct conducing to the adultery." Then follows a sentence,[19] which we need not read, which suggests that where a wife has obtained an order, as in that case, on the ground of adultery, it is not unreasonable that she should be unable to invoke the same adultery as conducing to adultery subsequently committed by her. Whereas if her subsequent adultery is brought about by wilful failure to comply with the order itself, the case is different.

---

[13] [1903] 2 K.B. 270.

[14] [1952] P. 119; [1951] 2 T.L.R. 1086.

[15] Ibid.

[16] 6th ed., pp. 534, 535, n. (*d*).

[17] [1952] P. 119, 121.

We do not think it necessary to deal with Mr. King Anningson's argument that *Ruther* v. *Ruther* [20] can be distinguished and does not bind us. On the narrow point that it is not legitimate to import the words of the proviso of section 6 into section 7 of the Act of 1895, we are clearly bound. But, in our opinion, the question is whether the right of a husband under section 7 to rely on an act of adultery at which he has connived, or which he has condoned—and it seems to us that it is difficult to distinguish between the two in this respect—does not fall to be determined on more general considerations.

It is plain that, from the Matrimonial Causes Act, 1857, onwards, connivance at and condonation of adultery, relied upon as a ground either for dissolution or for judicial separation, have been made absolute statutory bars to relief on the petition. But it is also clear that the adultery of a spouse petitioning for restitution of conjugal rights affords no defence to the suit if that adultery has been either connived at or condoned by the other spouse: *Hope* v. *Hope*, *per* Sir Cresswell Cresswell.[21]

Moreover, adultery connived at cannot be regarded as a reasonable excuse for desertion: *Herod* v. *Herod*,[22] approved by the Court of Appeal in *Callister* v. *Callister*.[23] Nor, at common law, can adultery so connived at or condoned avail as a defence to a claim for necessaries against a husband whose wife has pledged his credit: *Cooper* v. *Lloyd* [24]; *Wilson* v. *Glossop*.[25] In the latter case, in the Divisional Court, Cave J., after considering some of the early authorities, said [26]: " . . . it is at all events " admitted that a husband has no right to turn his wife out of " doors under circumstances which would not disentitle her to " succeed in an action for restitution of conjugal rights." And in the Court of Appeal Lord Esher said [27] that the argument to exonerate the husband who had connived at his wife's adultery from liability to maintain her would, if it was sound, establish that, if he had forced his wife to prostitution and lived on the proceeds of her shame, he might still, whenever he pleased to do so, turn her out of doors for that very adultery, and declare that he was no longer liable for her maintenance. Lord Esher added [28]: " Nothing would induce me to declare that such was " the law except a superior authority which would bind me," and he said that there was not and there could not be a symptom of authority in support of such a proposition.

---

[18] [1952] P. 119, 121.
[19] Ibid.
[20] [1903] 2 K.B. 270.
[21] (1858) 1 Sw. & Tr. 94, 104.
[22] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.
[23] [1947] W.N. 221; 63 T.L.R. 503.

Although Lord Esher was referring to the right of a wife, at whose adultery the husband had connived, to pledge his credit, and we are considering the right of a wife whose adultery has been condoned, to keep her order under a code which has been said, however loosely, to be the statutory equivalent of the right of a wife to pledge her husband's credit for necessaries, it seems to us that Lord Esher would have approved of Mr. King Anningson's reductio ad absurdum above referred to.

Thus, by the common law, by the ecclesiastical law, and by the statute law relating to matrimonial causes, a husband is barred from reliance on adultery which he has condoned. But, it is said, granted all this, why should Parliament go out of its way to express, in the proviso to section 6, the qualification about condonation and connivance, if it goes without saying that the same qualification must necessarily be read into section 7; and why does not the expression in the one section have the effect of exclusion from the other?

But it must be remembered that in 1895 Parliament was setting up an entirely new jurisdiction to deal with the maintenance of married women, and it may be that, in introducing the common law principle that an act of adultery was a bar to relief Parliament thought it right to introduce the proviso that wilful neglect or misconduct of the husband conducing to such act of adultery, although that would only be a discretionary bar to a petition for divorce or judicial separation, should be an absolute bar to his relying on an act of adultery, to which he had so conduced, in order to oust the jurisdiction of the court; and that having specified conduct conducing as an absolute bar, it was thought desirable to include a reference to condonation and connivance, which were recognized as being absolute bars, lest they should be thought to be excluded.

---

[24] (1859) 6 C.B.N.S. 519, 524.

[25] (1887) 19 Q.B.D. 379; affd. (1888) 20 Q.B.D. 354; 4 T.L.R. 239.

[26] 19 Q.B.D. 379, 381.

[27] 20 Q.B.D. 354, 356.

[28] Ibid.

Admittedly this does not explain the omission from section 7 of any proviso about conduct conducing. But it may well be that as regards connivance and condonation Parliament was content to rely on the general law.

On the other hand, the special introduction, by the Act of 1925, of defiance of the court's own order as the one example of conduct conducing as a discretionary bar may be explained by the desirability of getting rid of the decision in *Ruther* v. *Ruther*,[29] in which the conduct conducing took that particular form.

However that may be, and whether or not it is satisfactory that the remaining area of conduct conducing should be left unprovided for, we take the same view as Lord Esher about the shocking result which would follow from ignoring condonation, which is a blotting out of the offence itself, or connivance, which assumes that the husband is at least an accomplice in, if not the actual promoter of his wife's adultery, as an implied exception to the generality of the words in the last sentence of section 7. In other words, we hold that the words " an act of adultery " in section 7 must be qualified as meaning an act of adultery on which the husband is entitled to rely, and that he cannot rely on the act of adultery in question because he has condoned it.

Finally, there remains the question, first in point of time, whether there had been a resumption of cohabitation between November, 1954, and March, 1955, which rendered the order in the wife's favour non-effective.

We were inclined to think that, as this matter had not been dealt with by the justices, we ought to send it back for determination, but we were pressed by both counsel to determine it ourselves.

The facts have already been fully stated. Thus, for a period of about five months the parties were seeing each other more or less regularly on Saturday evenings, on many of which occasions sexual intercourse took place, until some quarrel about a card, the nature of which is not clear on the evidence, put an end to

[29] [1903] 2 K.B. 270.

that series of visits. At that time, of course, there was no question of condonation. Indeed, it is doubtful whether the wife and Radford had even met before March 21, 1955; at any rate, it is sufficient to say that the husband had no knowledge of anything between the wife and Radford at that time.

On the footing that the husband is held conclusively to have condoned the adultery, the anomaly of the contrast between the issue of condonation and that of the resumption of cohabitation in circumstances such as these is most clearly set out in the passage in the judgment of Jenkins L.J. in *Perry* v. *Perry*,[30] in which he expresses what would, apart from authority, have been his own view:—" It seems to me prima facie unreasonable that " an act, which is accorded such a decisive effect as an affirma- " tion by the injured party of the married state for the purposes " of condonation, should be able to take place consistently with " the uninterrupted continuance of a state of desertion, which, " while it continues, amounts to a negation of the married state. " Suppose the case of a wife who is in desertion and has com- " mitted adultery. With knowledge of the adultery the husband " seeks her out and has intercourse with her. This is decisive " as a condonation of, and affirmation of, the marriage notwith- " standing the adultery. The husband, by his conduct, has " taken his wife back as his wife, adulteress though she has been. " How can it consistently be said that, although he has taken her " back and reinstated her as his wife, she has not come back " to him, but has been continuously, even during the decisive " act of intercourse, in a state of desertion from him? "

Jenkins L.J., however, agreed [31] with the rest of the court that they were bound by authority to draw a clear distinction between condonation and a resumption of cohabitation and to hold that the latter involved the mutual intention of both spouses; and Hodson L.J., in rejecting, as being inconsistent with authority, the argument that *Mummery* v. *Mummery* [32] was wrongly decided because once the sexual act is proved the factum of separation has gone, said [33]: " It is now, I think, too " late to say that acts of intercourse per se operate to terminate " desertion."

The result is that, although the last act of intercourse on May 8, 1955, is decisive against the husband on the issue of condonation of the adultery found to have been committed earlier

---

[30] [1952] P. 203, 222.

[31] Ibid. 228.

[32] [1942] P. 107; 58 T.L.R. 203; [1942] 1 All E.R. 553.

[33] [1952] P. 203, 229–230.

1955

MARCZUK v. MARCZUK.

on that night, the nature of the course of sexual intercourse which occurred between the spouses in the five months between November and March is equivocal, and it is necessary for us to decide whether there was or was not an intention on the part of both of them to resume cohabitation.

It was argued, on behalf of the wife, that the justices have impliedly found that there was no resumption of cohabitation, because by virtue of section 2 (2) of the amending Act of 1925, the resumption of cohabitation has the effect of putting an end to the order, and yet they refused to remit arrears under the order, which, if there had been a resumption of cohabitation, must, to some extent at any rate, have accrued due after the order had thus ceased to be effective. In our opinion it is impossible to imply such a finding in face of the express statement of the justices that the issue of the resumption of cohabitation was not argued.

On the other hand, it was argued with some force that it is impossible for the husband to deny that he, for his part, intended to resume cohabitation, since the resumption of cohabitation is made the first ground of his application to discharge the order. If, therefore, the wife also intended to resume cohabitation the mutual intent would be established; and counsel relied on three points as showing that the wife did intend to resume cohabitation: in the first place, her saying, according to the husband, shortly after the parting, "I will come back one day"—a statement of intention which, it was argued, determined the character of her subsequent visits. He relied next on the fact that it was the wife who initiated the series of visits, and, finally, on the frequency with which they occurred, and the period over which they lasted. These facts taken together, Mr. Sullivan suggested, were conclusive of the wife's intention.

No doubt it may be difficult to draw the line between a series of what have been described in the authorities as casual acts of sexual intercourse and intercourse so regular and frequent as to compel a finding of resumption of cohabitation, on the principle that there must come a point at which a number of individual grains becomes a heap. Nevertheless, recognizing this, and although it may be difficult to draw the line, we think, upon the authorities, that it is open to us to find that this case is on the wrong side of any reasonable line that can be drawn. Without having seen the wife examined and cross-examined on this very issue, we do not feel that we are compelled by what admittedly happened to hold that she, at any rate, intended to resume cohabitation.

Reliance was also placed on the decision of this court in *Abercrombie* v. *Abercrombie*[34]—a decision which was, incidentally, approved by Lord Simon in *Henderson* v. *Henderson and Crellin*.[35] But, in our opinion, that case is distinguishable, because there everything except a resumption of actual residence in the same house tended to show that the reconciliation was complete, and was intended to be so by both spouses, until the wife attempted to go back on it for reasons which were held not to justify her in doing so. That seems to us to be the direct converse of this case, where the only evidence of resumed cohabitation is the fact of sexual intercourse.

In our opinion, the reality of the matter is that the primary object of the wife's visits was to get some of the money which was in arrears under the order, albeit she knew that sexual intercourse might, or even probably would, take place. But, except for the acts of sexual intercourse, no other attribute of a resumption of married life is present here. If the wife really intended to resume cohabitation, it is difficult to understand why, in the case of each of these visits to the matrimonial home, she departed as soon as sexual intercourse had taken place. We do not think, even if the intention to resume cohabitation ought to be imputed to the husband, that it would be right to draw the inference that the wife had any such intention.

This ground of the husband's complaint, therefore, fails.

The result is that we dismiss the husband's complaint that the order ceased to be effective on the ground that cohabitation had been resumed between November and March. We support the finding of the justices that the wife committed adultery on May 8, 1955, and we hold that, as a matter of law, it is conclusively established that the husband condoned that adultery by sexual intercourse on May 8, 1955, with knowledge of the facts. And, finally, we hold that having condoned that act of adultery, he is barred from relying on it by the fact that he condoned it. The result is that we hold that the order of September 8, 1954, remains effective, and the order discharging it must be set aside.

Appeal allowed.
Leave to appeal.

E. J.

---

[34] [1943] 2 All E.R. 465.

[35] [1944] A.C. 49.

C. A.

1956

MARCZUK v. MARCZUK.

The husband appealed.

P. Goodenday and *D. Sullivan* for the husband. It is not contended that there was no condonation by the husband of the wife's adultery. The question is whether on the true construction of section 7 condonation defeats the claim of the husband to have the wife's maintenance order revoked. The Divisional Court held that it did. The question whether there had been a resumption of cohabitation by the parties was argued before the Divisional Court, which held that there had not. In his judgment Lord Merriman P. said that by the common law, by the ecclesiastical law and by statutory law relating to matrimonial causes a husband was barred from relying on adultery which he had condoned, and he found it difficult to understand why Parliament should go out of its way to express in the proviso to section 6 the qualification about condonation and connivance if it did not mean the same qualification to be read into section 7. The Act of 1895 is a statute which stands entirely on its own and is not affected by the provisions of the general law. As to the question of resumption of cohabitation, it is submitted that the parties did resume cohabitation. Either point is sufficient for the purposes of this appeal.

The Divisional Court raised the point that under section 7, as amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, condonation was sufficient to defeat the husband's claim. They held that there must be read into section 7 words which are not there; but it is submitted that Parliament meant what it said, namely, that if a wife committed adultery after she had obtained an order for maintenance, that was the end of that order. There was no injustice done to the wife, for she could still apply to the justices under section 4 for the restoration of her conjugal rights under section 6, on the ground that her adultery had been condoned.

[SINGLETON L.J. You appear to be proceeding on a technicality.]

If she proceeded now she would not be entitled to the arrears. The general principles of construction are relied upon and this court ought not to read into section 7 words which are not there. As to the primary rules of construction, see *Special Commissioners for Income Tax* v. *Pemsel*[1]; *In re Ryde and Stedman's Contract*,[2] and *In re a Debtor*.[3] The primary purpose of the Act of 1895 was to introduce the power of a wife to get maintenance without going to the High Court.

---

[1] [1891] A.C. 531.

[2] [1927] 2 Ch. 72.

[3] [1948] 2 All E.R. 533.

[HODSON L.J. To enable a married woman left without support to get support even if she had gone astray herself.]

[ROMER L.J. The wife would have to show under section 4 the refusal of the husband to maintain her.]

[SINGLETON L.J. Would it be wrong if she put in a cross-application saying that if the existing order were revoked she would ask for another order?]

She would have to wait for at least a week to show that the husband was wilfully refusing to maintain. Having regard to the summary procedure, wherever the wife commits adultery the matter must again come before the justices.

[HODSON L.J. If the husband is in arrears can he apply to revoke the maintenance order?]

[SINGLETON L.J. The wife was owed £42 in respect of arrears, and the order was revoked by the justices, except as to arrears. Nothing has been paid by this husband, but the justices revoked the order except as to the £42. There has been an appeal to the Divisional Court and another appeal to this court, and it is said that there can be a fresh application to the justices. It is apparently only a matter of arrears. The parties have legal aid and I cannot see why public money should be wasted on what is purely academic.]

If the legislature had intended that condonation was a bar they would have said so in section 7. It must be assumed that the omission was part of the legislature's policy. It was the decision in *Ruther* v. *Ruther*,[4] on which the husband relies, which led to the passing of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. [*Read* v. *Read*[5]; *Abson* v. *Abson*[6]; *Leavis* v. *Leavis*,[7] and *Perry* v. *Perry*[8] were also referred to.]

G. R. King Anningson for the wife. As to the matter of arrears of maintenance, under section 76 of the Magistrates' Courts Act, 1952, there is a general discretion, and the order is as enforceable as an affiliation order. The magistrates may also remit. Section 8 of the Payments (Justices' Procedure) Act, 1935, is in exactly the same terms as the Act of 1952. The husband is never in peril, where the wife lives in adultery for three years, of having to pay under the order for those three years.

---

[4] [1903] 2 K.B. 270.

[5] [1952] P. 119; [1951] 2 T.L.R. 1086.

[6] [1952] P. 55.

[7] [1921] P. 299.

[8] [1952] P. 203.

C. A.
1956

Marczuk
v.
Marczuk.

The wife has to apply to the court for payment and the husband may then ask the court to remit.

The Act of 1895 was the beginning of an attempt to improve the position of a wife. Under ecclesiastical law condonation was an absolute bar to divorce. Connivance was also an absolute bar, although condonation was meritorious because it came after the adultery and connivance was blameworthy. One of the principles of divorce law is to maintain the marriage. Condoned adultery was not a defence to a wife's suit for restitution of conjugal rights, though it was a step towards getting maintenance. The Married Women's Property Act, 1857, the Matrimonial Causes Act, 1878, the Magistrates' Courts Act, 1952, and the Married Women's Maintenance Act, 1886, show how the situation arose which led to the proviso to section 6 of the Act of 1895 being amended.

Legislation now makes something which had been a discretionary bar compulsory in summary jurisdiction. The word " shall " now takes the place of " may " in earlier statutes. In the proviso to section 6 " condonation, connivance and conduct conducing " are to be absolute bars. Either the legislature never contemplated that a husband who had been guilty of condonation or connivance would apply to revoke an order for maintenance, or the draftsman by forgetfulness failed to include condonation in section 7. Conduct conducing was what was considered in *Ruther* v. *Ruther*,[9] and not condonation or connivance, and it is submitted that this court should not apply that decision. It was not argued on the basis that it was necessary to import the proviso to section 6 into section 7. The proper way to read section 7 is: " If any married woman upon whose application an order shall " have been made under this Act shall . . . commit an act of " adultery *on which the husband is entitled to rely* " it shall upon proof thereof be discharged. That construction of the section brings summary jurisdiction into line with the practice of the divorce court. The same result would be achieved by importing into section 7 the proviso to section 6. [*Abson* v. *Abson*[10] and *Read* v. *Read*[11] were also referred to.]

Cur. adv. vult.

March 5. The following judgments were read.

Singleton L.J. Wasyl Marczuk and Constance Marczuk were married on January 25, 1950. They parted in the year

---

[9] [1903] 2 K.B. 270.

[10] [1952] P. 55.

[11] [1952] P. 119.

1954, and on September 8, 1954, the justices for the petty sessional division of Paignton made an order in favour of the wife under the Summary Jurisdiction (Married Women) Act, 1895, by which the husband was ordered to pay £3 a week for her maintenance and £1 a week for the maintenance of the child of the marriage.

On May 12, 1955, the husband was £42 in arrears, and a summons was issued on the wife's complaint that he had disobeyed the order. On May 28 the husband laid information that his wife had committed adultery on May 8 and on divers dates thereafter, and submitted that the order of September 8, 1954, should be revoked or varied. On June 29, 1955, the justices revoked the order of September 8, 1954 (except as to the £42 arrears) on the ground of adultery by the wife on May 8, 1955.

On July 16, 1955, notice of appeal to the Divisional Court of the Probate, Divorce and Admiralty Division was given by the wife. The grounds of appeal were solely directed to the question whether adultery had been proved. On November 16, 1955, the appeal was heard by Lord Merriman P. and Barnard J. and was allowed, for reasons to which I shall refer in a moment, and the order of revocation was set aside. Leave to appeal was given. On December 21, 1955, notice of appeal to this court was given by the husband.

The evidence of adultery by the wife was not strong, as is shown in the judgment of the Divisional Court. The court thought, however, that there was sufficient evidence on which the justices could find as they did. The evidence on which they acted was that of the husband, who said that on the same night on which he alleged adultery he had gone to bed with his wife, upon which a question as to condonation arose. The position appears from a passage of the judgment of the Divisional Court[1]: "A more important point, perhaps, is that the significance of "the fact that sexual intercourse between husband and wife took "place on May 8, 1955, appears to have escaped the attention of "the justices, not only as to condonation but also in relation to "the credibility of the husband about the earlier events of that "evening. Nevertheless, we have come to the conclusion that "there was ample evidence before the justices, if they accepted "it, as they did, to justify a finding of adultery on May 8, 1955. "Even if the justices misdirected themselves about the onus of "proof, and have not fully appreciated the evidence in the "respects we have just mentioned, we do not think that we ought

---

[1] Ante, p. 227.

C. A.
1956

Marczuk
v.
Marczuk.

Singleton L.J.

"to interfere with their finding. The real difficulty begins on the "assumption that the finding of adultery cannot be disturbed.

"Two questions arise. First: has the husband condoned the "adultery of which he complains? and, secondly: if so, what, if "any, effect has such condonation on the operation of that part "of section 7 of the Act of 1895—under which this application "is made." [His Lordship read further from that judgment, and continued:]

No question was raised before this court on the finding that the wife had committed adultery on May 8. The evidence of the husband was accepted upon that issue. The wife had denied that she had had sexual intercourse with her husband after they parted in the year 1954. The Divisional Court accepted the evidence of the husband that there had been sexual intercourse between them, and, in particular, that there was on the night of May 8. On that basis it was open to the court to find that there was condonation by the husband. The Divisional Court found that there was condonation, and it appears to me that on the evidence given by the appellant husband this court ought to accept that finding, though the question was not before, or considered by, the justices.

It is the second question raised in the judgment which gives rise to difficulty. In order to consider it, it is necessary to refer to the Act of 1895. It is an Act "to amend the law relating "to the summary jurisdiction of magistrates in reference to "married women." Section 4 provides that a married woman may in any of the circumstances therein set out apply to a court of summary jurisdiction for an order under the Act. Section 5 sets out the powers of the court as to the making of an order and in regard to its provisions.

Section 6 reads: "No orders shall be made under this Act "on the application of a married woman if it shall be proved "that such married woman has committed an act of adultery: "Provided that the husband has not condoned, or connived at, "or by his wilful neglect or misconduct conduced to such act of "adultery."

Section 7 contains provisions for the alteration, variation or discharge of any such order. It ends: "If any married woman "upon whose application an order shall have been made under "this Act . . . shall voluntarily resume cohabitation with her "husband, or shall commit an act of adultery, such order shall "upon proof thereof be discharged."

Mr. Goodenday, on behalf of the husband, submitted that an act of adultery by the wife had been proved and that upon proof thereof the order of September 8, 1954, must be discharged. He drew attention to the difference between the provisions of section 6 and section 7 and asked us to hold that no question of condonation arises under section 7.

Mr. King Anningson, for the wife, submitted that the concluding words of section 7 should be read as "or shall commit "an act of adultery *on which the husband is entitled to rely*, "such order shall upon proof thereof be discharged." He argued that the husband was not entitled to rely on the act of adultery of the wife as he had condoned it.

It was accepted by the Divisional Court that in view of the decision in *Ruther* v. *Ruther*,[2] it was not legitimate to import the words of the proviso to section 6 into section 7 of the Act of 1895, but the court held that the words of section 7 must be qualified as meaning an act of adultery on which the husband is entitled to rely, and that he cannot rely on an act of adultery which he has condoned. On this ground they held that the husband was not entitled to rely upon adultery of the wife on May 8 which he had condoned, and the appeal of the wife was allowed.

With all respect, that seems to me to be introducing into the section words which are not there, and I cannot think that it is right to do so. The result would be as though the proviso to section 6 had to be read into section 7, or as though the words suggested by Mr. King Anningson had to be read into section 7. The foundation for the judgment of the Divisional Court appears to be that by the ecclesiastical law and by the statute law relating to matrimonial causes a husband cannot rely on adultery which he has condoned. It appears to me that that which we have to consider in the present case is the wording of the statute and, in particular, the wording of section 7 as contrasted with section 6. Adultery which had been condoned does not prevent a married woman from obtaining an order under the Act, but it may well be that it was the policy of the legislature to encourage chastity on the part of one who had obtained an order and to say that the order should be discharged on proof of adultery—whether the adultery had been condoned or not. There is nothing to prevent a woman from obtaining another order if her adultery has been condoned and if she can prove her case. I do not see that this leads to absurdity or to undue hardship.

---

[2] [1903] 2 K.B. 270.

The Act of 1895 was an amending Act. It took the place of, and revoked, section 4 of the Matrimonial Causes Act, 1878, and the whole of the Married Women (Maintenance in Case of Desertion) Act, 1886. Section 4 of the Act of 1878 gave power to a court or magistrate, if a husband was convicted of an aggravated assault upon his wife, to order that the wife should be no longer bound to cohabit with her husband, and to order payment of a weekly sum to her, with a proviso that no order for the payment of money by the husband should be made in favour of a wife who should be proved to have committed adultery, unless such adultery had been condoned—and that any order for payment of money *may* be discharged by the court or magistrate by whom such order was made upon proof that the wife has since the making thereof been guilty of adultery.

The Act of 1886 enabled two justices to make an order in favour of a wife whose husband had wilfully refused or neglected to maintain her or had deserted her, with a proviso to section 1 (2) " that no order for payment of any such sum by the husband " shall be made in favour of a wife who shall be proved to have " committed adultery, unless such adultery has been condoned, " and that any order for payment of any such sum *may* be dis-" charged . . . upon proof that the wife has since the making " thereof been guilty of adultery."

The word " may " which appeared in the proviso to section 4 of the Act of 1878 and in the proviso to section 1 (2) of the Act of 1886 becomes " shall " in section 7 of the Act of 1895. It is notice in the strongest terms to a woman who obtains an order in her favour that she must behave herself. If she commits an act of adultery " the order shall upon proof thereof be dis-" charged." The question is whether she has committed an act of adultery, not whether she has done something which in other proceedings would be held to be a matrimonial offence. It is of first importance to notice that condonation is not mentioned in section 7 while it is in section 6. The same principle appears from the two earlier Acts.

In my opinion the word " adultery " in section 7 of the Act of 1895 should be read in its ordinary meaning: there is no reason to introduce anything into it: the introduction of the words (or meaning) suggested would mean shutting one's eyes to the difference between section 6 and section 7. This does not mean that a wife is deprived of any protection. She may apply for another order, and, if she can establish a case, her adultery which has been condoned will not be a bar. The effect of section 7 is that her right to hold an order goes upon proof of adultery.

I see no answer to this upon the wording of section 7 (as contrasted with section 6) unless it can be said that there is something in the nature of an estoppel arising against the husband, and nothing of that kind has been suggested. Again, section 7 was amended by section 2 of the Summary Jurisdiction Act, 1925, by the addition of the words " Provided that the court " may, if the court think fit—(*a*) refuse to discharge the order if, " in the opinion of the court, such act of adultery as aforesaid " was conduced to by the failure of the husband to make such " payments as in the opinion of the court he was able to make " under the order . . ." No doubt the amendment was to remedy the position shown by the decision in *Ruther* v. *Ruther*.[2]

In that particular case (I take the facts from the headnote): " Where an order for a weekly payment by a husband to his " wife is made under the Summary Jurisdiction (Married Women) " Act, 1895, and the wife subsequently commits adultery, the " husband is entitled under section 7 of the Act, on proof thereof " before a court of summary jurisdiction, to have the order " discharged in spite of a finding by the court that he has been " guilty of conduct conducing to the adultery; and he is not " liable to make any further payments to his wife, although the " order may not have been in terms discharged by the adjudication as to the wife's adultery. The decision of a court of " summary jurisdiction upon an information or complaint by a " married woman alleging that payments due to her from her " husband under an order made under the Act of 1895 are in " arrear, is not a matter in respect of which an appeal lies under " section 11 of that Act to the Probate, Divorce and Admiralty " Division; but the court has power to state a case "—which was done in that particular case.

Lord Alverstone C.J. said[2]: " With regard to the substantial " question raised by the case, it appears that in 1898 an order " was made under section 4 of the Act of 1895 for the payment " by the appellant to the respondent of a weekly sum of 10s. " In 1901 the appellant had got in arrears with his payments, " and a sum of £55 was owing by him. He ascertained that the " respondent had committed an act of adultery, and he applied " to the justices that the order might be discharged in accord- " ance with section 7 of the Act. The justices found that the " adultery was proved, and in my opinion it thereupon became

[2] [1903] 2 K.B. 270, 274.

C. A.
1956

MARCZUK
v.
MARCZUK.

Singleton L.J.

"their duty under section 7 to discharge the order. What they "did was to make an indorsement upon the order in the terms "set out in the case. I do not know what was intended to be "the effect of that indorsement. It may be that the reason of "it was that the justices desired to make it clear that the wife's "remedy was to be kept alive as to arrears of payments which "had accrued due before that date. But however that may be, "I am of opinion that after the adultery had been proved on "December 4, 1901, the order ought to have been discharged, "and from that date it ceased to be an effective order."

Wills J. said[3]: "As to the main question, it is clear that "there is no power to order committal for non-payment of the "weekly sum after adultery on the part of the wife has been "proved. I do not mean to say that the respondent was not "entitled to recover arrears in respect of the period between the "date when the adultery was committed and the date when the "order ought to have been discharged."

Channell J. said: "I agree. The only point of substance "which has been raised on behalf of the respondent is whether "conduct by a husband which has conduced to his wife's adultery "has the effect of preventing the husband from obtaining the "discharge of an order in the same way as such conduct before "an order prevents the husband from relying on the adultery "as a reason why an order should not be made. In my opinion "it is impossible to adopt Mr. Rowsell's construction of section 7. "The proviso in section 6 cannot be read into section 7. That "being so, the appellant's liability to continue the payments "ceased after the adultery had been proved. The other questions "in the case are simply matters of form."

It appears to me that there would have been no reason for the amendment if the argument put forward on behalf of the wife is right. And there was no amendment to cover "condona-"tion." Furthermore, upon the view of the Divisional Court the proviso to section 6 in regard to adultery condoned would seem to be unnecessary.

Abson v. *Abson*[4] does not appear to have been brought to the notice of the Divisional Court. The question for decision was quite a different one, but there are passages in the judgments of the President and of Karminski J. which show the view they then took, though I do not suppose the point was argued. The President said: "That brings me to the point that if that fact

---

[3] [1903] 2 K.B. 270, 276.

[4] [1952] P. 55, 61, 62, 63; [1952] 1 T.L.R. 379; [1952] 1 All E.R. 370.

"does convict Mrs. Abson of adultery within the meaning of "section 7 of the Summary Jurisdiction (Married Women) Act, "1895, there is no more to be said about the matter, because "the obligation to set aside the order is absolute, unless a discretion is given in terms of the proviso added by section 2 of the "Act of 1925, which clearly does not apply in this case. . . . It "is no use saying that one is not perturbed by the point that a "proved act of sexual intercourse by a divorced wife with a "married man need not necessarily be held to be adultery within "the meaning of the Summary Jurisdiction Acts when those Acts "demand that if it is adultery there is no option but to discharge "the order on that ground."

Karminski J. said [5]: "My Lord has emphasized, and I venture "to repeat the emphasis, that in a case of this kind the High "Court is the suitable tribunal to investigate the claim, if any, "by the wife for maintenance. The fact that a wife has committed adultery is not, of course, an absolute bar to a court "awarding her maintenance on the dissolution of her marriage. "Section 19 of the Matrimonial Causes Act, 1950, lays down "what facts the court is to take into consideration, and amongst "those facts is the conduct of the parties. In many cases the "wife comes to the court and asks for maintenance although she "herself has committed adultery during the marriage, and has "had to seek the discretion of the court to be exercised in her "favour because of that adultery. That, of course, is a factor "which has to be taken into consideration. Similarly, it has "been held that the conduct of the parties after decree must "also be considered, and there is no doubt that adultery by a "petitioner wife after the dissolution of her marriage is also a "matter for consideration. The High Court, therefore, has the "power, and, indeed, the duty to consider the conduct of the "parties, whereas under the Summary Jurisdiction Acts, once "the wife has committed adultery then her order for maintenance must be discharged. I venture to repeat my entire "agreement with my Lord that in cases of this kind the suitable "and proper tribunal to inquire into the matter is the High "Court."

The decision of the Divisional Court in the present case is in conflict with the views then expressed as, indeed, it is with the decision in *Ruther* v. *Ruther*.[6] In my opinion, the appeal should be allowed and the order of the justices should be restored. I regret this for a number of reasons, into which I need not go.

---

[5] [1952] P. 55, 64.

[6] [1903] 2 K.B. 270.

The husband is in default. He has not paid the arrears due. It does not appear likely that the wife will ever receive them. I should have been glad if we could have refused to hear the appeal on the basis of the decision in *Leavis* v. *Leavis*,[7] but leave to appeal had been given and the parties had undertaken responsibilities under the Legal Aid and Advice Act, 1948.

HODSON L.J. This is an appeal by a husband from an order of the Divisional Court of the Probate, Divorce and Admiralty Division, which allowed an appeal by the wife from an order of the justices of the petty sessional division of Paignton. The wife had on September 8, 1954, obtained from the justices an order for maintenance under the provisions of the Summary Jurisdiction (Married Women) Act, 1895. On June 29, 1955, the justices had before them a summons for revocation of the order on the grounds (1) that there had been a resumption of cohabitation between about November 8, 1954, and March 21, 1955; (2) that on or about May 8, 1955, and divers dates thereafter, the wife had committed adultery. The justices had before them at the same time a summons by the wife for the enforcement of the arrears due to her under the original order. The justices did not consider the first of the grounds of the husband's claim, but found adultery (committed on May 8, 1955) proved, and discharged the order of September 8, 1954, upon that ground, while reserving to the wife the arrears due before the date of the adultery. The effect of this order was to remit in favour of the husband all arrears due from the date of the adultery to the date of their decision given on June 29, 1955.

The wife appealed to the Divisional Court, who held on the first point that there had been no resumption of cohabitation, and on the second point that the finding of adultery must stand. The court, however, went on to hold that the adultery, which was only found to have occurred on May 8, 1955, was condoned by the husband, who on the same day had sexual intercourse with his wife with full knowledge of the facts. They therefore discharged the order of June 29, 1955, thus leaving in force the maintenance order made the previous year. The husband has appealed to this court, where the argument has proceeded on the basis that the adultery was proved, and also that condonation of that adultery was proved. Each side expressly refrained from reopening either of these issues, so that the only remaining question was whether the Divisional Court was right as a matter of law in discharging the order of June 29, 1955, which, in its turn, revoked the order of September 8, 1954, on proof of adultery notwithstanding that the adultery complained of had been condoned.

---

[7] [1921] P. 299; 37 T.L.R. 578.

The main contention of the husband is that, the wife having committed adultery, he is entitled to have the order for maintenance discharged. He relies upon the plain words of section 7 of the Summary Jurisdiction (Married Women) Act, 1895, the concluding words of which are: "If any married woman upon "whose application an order shall have been made under this "Act, or the Acts mentioned in the schedule hereto, or either "of them, shall voluntarily resume cohabitation with her "husband, or shall commit an act of adultery, such order shall "upon proof thereof be discharged." To this section the following proviso was added by the Summary Jurisdiction Act, 1925, s. 2 (1): "Provided that the court may, if the court "think fit—(*a*) refuse to discharge the order if, in the opinion "of the court, such act of adultery as aforesaid was conduced "to by the failure of the husband to make such payments as in "the opinion of the court he was able to make under the "order . . ."

Subject to the proviso it is contended that the duty to discharge the order is absolute, especially as when one looks at section 6 of the Summary Jurisdiction Act, 1895, which enacts that no order shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery, there is this proviso: "Provided that the husband has not condoned or connived at, "or by his wilful neglect or misconduct conduced to such an act "of adultery."

Sections 6 and 7 of the Act of 1895 are the successors of section 1 (2) of the Married Women (Maintenance in case of Desertion) Act, 1886, an Act to provide for the support of deserted wives and their families. Section 1 (2) reads as follows: "Provided always, that no order for payment of any such sum "by the husband shall be made in favour of a wife who shall be "proved to have committed adultery, unless such act has been "condoned, and that any order for payment of any such sum "may be discharged by the justices or magistrate by whom such "order was made, or justices or magistrate sitting in their or his "stead, upon proof that the wife has since the making thereof "been guilty of adultery."

C. A.
1956

MARCZUK
v.
MARCZUK.

Hodson L.J.

This proviso follows the lines of the proviso to section 4 of the Matrimonial Causes Act, 1878. Hence it is argued that the maxim expressio unius est exclusio alterius applies, and there is no room for any qualification of the word "adultery" in section 7 of the Act of 1895 other than that added by the proviso introduced in 1925. The argument is reinforced by reference to the Acts of 1878 and 1886, where condoned adultery and adultery without any qualification are in each case contained in the same subsection so as to emphasize the contrast.

The appellant husband relies also on *Ruther* v. *Ruther*,[8] a decision of the King's Bench Divisional Court upon the construction of section 7 of the Act of 1895. Channell J. put the effect of the decision shortly in these words: "The proviso in "section 6 cannot be read into section 7." That decision dealt with "conduct conducing," which is the creation of statute and not part of the common law. The justices had there decided that the husband had, by his failure to comply with the order, conduced to the wife's adultery, and their endorsement to that effect was held to be mere surplusage. It is no doubt the fact that the decision led to the enactment in 1925 of the proviso to section 7 of the Act of 1895 which I have read, and which removes the particular hardship which the decision in *Ruther* v. *Ruther*[8] revealed.

The decision in *Ruther* v. *Ruther*[8] was followed since the passing of the Act of 1925 by the Divisional Court of the Probate, Divorce and Admiralty Division in *Read* v. *Read*,[9] a case in which the magistrates had wrongly refused an order for revocation sought on the ground of adultery where the conduct conducing found was of a kind not covered by the language of the amending Act of 1925. The question of absolute bars to relief in divorce was expressly left open, and I for my part desire to throw no doubt on the validity of the decisions of either Divisional Court. I agree that the proviso in section 6 cannot be read into section 7, but do not accept that this solves the question of the meaning of the word "adultery" in the latter section.

The Divisional Court have reached the conclusion that the word "adultery" in its context in section 7 can only mean adultery upon which the husband can rely. The appellant husband has contended for the full rigour of the Latin maxim. He says that nothing of the existing law can be read into the section. He concedes that, at common law, where a husband has connived at his wife's adultery, or condoned it, he has no defence to a claim by her for necessaries, and that by the ecclesiastical law and the statute law relating to divorce and matrimonial causes a husband's claim for relief was and is barred by the general law. Nevertheless, even if the adultery is connived at, he contends that the order must be discharged because the words of the statute are absolute and imperative. He referred to *Abson* v. *Abson*,[10] a decision of the Divisional Court of the Probate, Divorce and Admiralty Division, which contains dicta upon the absolute effect of the section.

---

[8] [1903] 2 K.B. 270.

[9] [1952] P. 119; [1952] 2 T.L.R. 1086.

I am unable to accept this contention. As Lopes L.J. said in *Colquhoun* v. *Brooks*,[11] the maxim expressio unius est exclusio alterius is often a valuable servant but a dangerous master in the construction of statutes or documents. Sections 6 and 7 are concerned with two different matters. The former deals with a wife's right to maintenance and states the exception in case of her adultery, with the proviso which states the exception to the exception. The wife as a wrongdoer is barred from her claim unless she is excused by the proviso. Section 7, on the other hand, deals with the right of the husband to be relieved from his obligation to pay maintenance under an existing order and must be construed in that light. If the argument for the appellant is accepted in full, a husband can force his wife to prostitution and live upon the proceeds, and then obtain a revocation of the order based on the adultery of which he himself was an active instigator.

In *Wilson* v. *Glossop*,[12] an action for necessaries brought against a husband who had connived at his wife's adultery, Lord Esher said, with reference to the contention that such a man could turn his wife out of doors and declare that he was no longer liable for her maintenance, "Nothing would induce me to "declare that such was the law except a superior authority "which would bind me." I respectfully concur in the language of Lord Esher, and know of no authority which binds me so to decide upon the construction of the section now under consideration.

It may be said that the qualification as to connivance may be admitted because otherwise a husband would be enabled to rely upon his own wrong, and, therefore, his claim for relief must in such a case be rejected. The recognition of this exception is,

---

[10] [1952] P. 55.

[11] (1888) 21 Q.B.D. 52; 4 T.L.R. 494.

[12] (1888) 20 Q.B.D. 354; 4 T.L.R. 239.

I should have thought, necessary to avoid a monstrous result and points the way to a true construction of the proviso. It is said, however, that there is no such monstrosity in admitting a husband's claim to relief on the ground of adultery when the adultery is condoned. Nevertheless, the principle involved is not wholly dissimilar. Condonation and connivance often have to be considered together. Connivance is a kind of condonation in advance, although, as Dr. Lushington said in *Turton* v. *Turton*,[13] while condonation may take place without implying the slightest degree of blame, yet connivance necessarily involves criminality on the part of the person who connives. He also said this: "I "apprehend that these are essentially different in their nature "but either may have the same legal consequence."

If the adultery is condoned it is obliterated and as if it had never been. It has been blotted out so as to restore the offending party to the same position which he or she occupied before the offence was committed: see Lord Chelmsford's speech in *Keats* v. *Keats*.[14] The wife's right to necessaries subsists: see *Cooper* v. *Lloyd*.[15] The husband has released the injury: see *Beeby* v. *Beeby*,[16] where Sir William Scott, afterwards Lord Stowell, said: "Condonation is forgiveness legally releasing the injury . . . in "general it is a good plea in bar; it is not fit that a man should "sue for a debt which he has released."

Can it then on any principle be said that the husband is entitled to relief? I cannot see that he is. An order in his favour must cause an injustice to the wife. The effect in this case is that, the order of September 8, 1954, being discharged as from June 29, 1955, the justices have remitted the arrears from May 8, 1955, to June 29, 1955, although the wife was entitled to be maintained by her husband during that period, her adultery committed on that day having been condoned on the same day. It is no answer to this injustice to say that she could at once issue another summons for maintenance on the discharge of her subsisting order.

Had there been no arrears due or remitted on June 29, 1955, when the order was discharged, the machinery of the court would have been invoked solely in order that the husband might have his wife, whom he had forgiven, branded as an adulteress, although her right to maintenance was at all material times subsisting, and if the husband continued to neglect to maintain her she would at once be entitled to a fresh order in view of the terms of the proviso to section 6 of the Act. I should be reluctant to be constrained to hold that the legislature intended such an absurd result.

---

[13] (1830) 3 Hag.Ecc. 338, 350, 351.

[14] (1859) 1 Sw. & Tr. 334.

[15] (1859) 6 C.B.N.S. 519, 524.

[16] (1799) 1 Hag.Ecc. 789.

The word "adultery" in section 7 cannot be construed simpliciter as voluntary sexual intercourse between a married person and a person of the opposite sex. It must be construed in the light of its context, which is that of a claim by a husband for relief from an obligation imposed upon him by a court order. I cannot construe the proviso as if the word "adultery" were followed by such words as "whether or not the adultery had been "condoned." I have no doubt that the right to relief on proof of adultery is barred not only by connivance but also by condonation.

It is perhaps not superfluous to add that this is not the first time in which the presence or absence of the word "condona-"tion" in a statute has given rise to questions of construction. Section 30 of the Matrimonial Causes Act, 1857, provides: "In "case the court . . . shall not be satisfied that the alleged "adultery has been committed, or shall find that the petitioner "has during the marriage been accessory to or conniving at the "adultery of the other party to the marriage, or has condoned the "adultery complained of, or that the petition is presented or "prosecuted in collusion with either of the respondents, then and "in any of the said cases the court shall dismiss the said "petition."

In *Dent* v. *Dent* [17] it was argued that the words of the statute were plain and subject to no qualification; but the argument was rejected by the Judge Ordinary, Sir James Wilde (afterwards Lord Penzance), who granted a decree when the adultery complained of had been condoned since it had been revived by later cruelty although revival of condoned offences was not mentioned in the statute.

Another striking illustration is, I think, to be found in the treatment of sodomy as a matrimonial offence, for by section 27 of the Act of 1857 a wife was enabled to obtain divorce on the ground of sodomy. No mention of condonation of sodomy appears in the Act, yet when the matter came to be considered by the Court of Appeal in *Statham* v. *Statham* [18] upon the construction of section 178 of the Judicature Act, 1925, which then regulated the duty of the court in dealing with condonation, not only of adultery but also of cruelty, all the members of the court expressed the view that condonation was a bar to relief. Greer

---

[17] (1865) 4 Sw. & Tr. 105.

[18] [1929] P. 131; 45 T.L.R. 127.

C. A.
1956

Marczuk
v.
Marczuk.

Hodson L.J.

L.J. said[19]: "When asked to make a decree of divorce or "judicial separation, the court is not confined to the issues raised "by the parties, but is bound to consider any facts proved in the "course of the case which disentitle the petitioner to the decree "for which she asks. Section 178 of the Judicature (Consolidation) Act, 1925, provides as follows: 'On a petition for divorce "'it shall be the duty of the court to satisfy itself so far as it "'reasonably can both as to the facts alleged and also as to "'whether the petitioner has been accessory to or has connived "'at or condoned the adultery or not, and also to inquire into any "'countercharge which is made against the petitioner.' It is "curious that this section only speaks of the petitioner being "accessory to or conniving at or condoning adultery, that is to "say, the cause of divorce mentioned in subsection (*a*) of section "176, and there is nothing about connivance or condonation of "the causes of divorce mentioned in the first part of subsection "(*b*), which includes sodomy, but it is difficult to suppose that "the court is bound to grant a decree for dissolution of marriage "to a wife who upon her own evidence has consented to the act "of which she complains. The rules with regard to condonation "and connivance as a bar to a decree for divorce were well "established in the practice of the ecclesiastical courts before the "Act of 1857: see the cases cited in Rayden on Divorce, 2nd "ed., pp. 107–110, and especially *Curtis* v. *Curtis*.[20] In my "judgment these rules apply to cases in which the ground alleged "for divorce is sodomy."

It would have been surprising if the decision had been otherwise, for the heinousness of the offence ought not to have any bearing on the question of condonation so as to make the offence incapable of being condoned. If the matter is looked at from the point of view of public policy it can hardly be thought that condonation of sodomy would be intentionally excluded from the purview of the statute, for the more heinous the offence the more meritorious would the forgiveness be.

The law of condonation has thus been recognized and acted upon as if it had been set out in full in the statutes dealing with matrimonial relief, although the legislature has not always thought it necessary to write out such law in full when the consequence of a matrimonial offence has had to be considered. I see no reason to make any exception to this recognition in construing the section now under consideration. I agree with the judgment of the Divisional Court, and would reject the main ground of appeal.

---

[19] [1929] P. 131, 144.

[20] (1859) 4 Sw. & Tr. 234.

The husband further contended, as a separate ground of appeal, that the order should be discharged on the ground that the parties had resumed cohabitation. I think it is sufficient to say that on the facts of this case no such ground was established, for there was no such setting up of a common home as to amount to a resumption of cohabitation. I would accordingly have dismissed the appeal.

Romer L.J. I find myself compelled in this case to a different view from that which was taken by the Divisional Court and which has commended itself to Hodson L.J. I differ from them with natural reluctance and more especially as I feel that the construction of section 7 of the Act of 1895, which I believe to be the true—and indeed the inescapable—construction, leads to a result which is both unexpected and inconvenient. These considerations are not, however, relevant if the language in which Parliament has expressed its intention is unambiguous.

Mr. King Anningson, for the wife, did not invite us to incorporate by implication in section 7, as a qualification of the act of adultery therein mentioned, the proviso which appears in section 6; and I am fully in agreement with the decision in *Ruther* v. *Ruther*[21] to the effect that that proviso cannot legitimately be so incorporated. Nevertheless, it appears to me that the wife's argument does in fact involve reading the greater part of the section 6 proviso into section 7, for Mr. King Anningson contended that the relevant words in the latter section should be read as "or shall commit an act of adultery on which the "husband is entitled to rely for not maintaining his wife," which would seem to be only a lengthier substitute for the words "provided that the husband has not condoned or connived at such "act of adultery" which appear in section 6. However that may be, the question is whether a court of construction can introduce the qualification of adultery into section 7 for which counsel for the wife contends. In my opinion, so to do would constitute an illicit departure from the field of construction into the unauthorized field of legislation.

The following considerations have led me to this view: (1) The qualifications in section 6 of the phrase "committed an act "of adultery" show that the phrase, if taken without the qualifications, was intended in that section to bear its ordinary signification, videlicet, sexual intercourse by a wife with some man other than her husband. When the same phrase was repeated in section 7 the inference surely is that it was intended to have the same signification as in section 6 in the absence of any similar or other qualifications; and there is none. It is, in my judgment, impossible to suppose, having regard to this marked difference of treatment in two succeeding sections of the same phrase, that the omission from section 7 of any of the qualifications which appear in section 6 was due to oversight or was other than deliberate. (2) The attention of Parliament was directed to section 7 in 1925. If they had then thought that the " act of " adultery " therein referred to was already impliedly qualified in the way for which the wife now contends,. I find it inexplicable that they should have amended it in the terms of section 2 (1) of the Summary Jurisdiction Act, 1925.

---

[21] [1903] 2 K.B. 270.

The explanation of the amendment offered on behalf of the wife is that Parliament was assuming as a matter of necessary implication that the adultery referred to in section 7 was confined to adultery uncondoned and unconnived at but that nevertheless it did not exclude adultery conduced to by the husband's misconduct; and that accordingly, whilst qualifying this latter conception in the one respect mentioned in the amendment, it was unnecessary at the same time to exclude from the section adultery which had been condoned or connived at. This seems to me to be a very difficult explanation to accept. Parliament is assumed to know the law (compare *Reg.* v. *Inhabitants of Watford*,[22] *per* Lord Denman, and *Young & Co.* v. *Royal Leamington Spa Corporation*,[23] *per* Lord Blackburn). In passing the amending legislation, therefore, of 1925 the legislature was presumably aware of the decision in *Ruther* v. *Ruther*[24]; and it has indeed been suggested that it was in order to overrule that decision that the amending legislation was passed. Now, it was of the essence of the judgment of the Divisional Court in *Ruther* v. *Ruther*[24] that the proviso in section 6 cannot be read into section 7, which means, as I understand it, that no part of the proviso can be introduced, by implication, into section 7. In the light of that decision which, ex hypothesi, was known to Parliament in 1925, it becomes impossible to attribute to it the assumption which I have mentioned as to the meaning of " adultery " in section 7; for that assumption could not reasonably

[22] (1846) 9 Q.B. 626, 635.

[23] (1883) 8 App.Cas. 517, 526.

[24] [1903] 2 K.B. 270.

co-exist with the decision in *Ruther* v. *Ruther*.[24] The 1925 amendment is, on the other hand, readily intelligible if Parliament was attributing the ordinary significance to the word " adultery " in section 7 and was cutting down the generality of that signification by introducing one qualification and one alone.

On the construction, then, of the Act of 1895 by itself, and aided further by the considerations which arise from the Act of 1925, I am unable to read the word " adultery " in section 7 of the former statute in the narrow manner for which counsel for the wife has contended; for it means, in my opinion, " adultery " according to the ordinary meaning of that term and nothing else. The relevant Act which immediately preceded the Act of 1895 was the Married Women (Maintenance in Case of Desertion) Act, 1886, and section 1 (2) of that Act contains a proviso which has already been quoted in my brethren's judgments and which, therefore, I do not repeat. It would, as it appears to me, be virtually impossible, as a question of construction, to attach by implication to " adultery " in the second part of that proviso any such qualifications as are expressly attached to the word in the earlier part; for one could scarcely find, as I think, a clearer case than is to be found in the proviso for the application of the maxim expressio unius alterius est exclusio. When, therefore, one finds that, for the purposes now relevant, sections 6 and 7 of the Act of 1895 are in substance (subject only to the difference to which Singleton L.J. has drawn attention) the successors of section 1 (2) of the Act of 1886, it is extremely difficult to attribute to the former a drastically different effect from that which results from the language of the latter.

In my view, accordingly, the effect of the concluding words of section 7 of the Act of 1895 is that a husband can, on proof of adultery by his wife, obtain the discharge of an order which has been made against him under section 4, even though that adultery has been condoned. It was somewhat naturally objected that if this view be right a husband who had expressly connived at his wife's adultery could equally avail himself of the relief which section 7 affords and which, it is said, Parliament could never have intended to extend to such a husband. I realize, of course, the force of this objection. As, however, the position is not very likely to arise—for it can be but seldom, I should imagine, that connivance would occur where husband and wife are living separate and apart—the objection is, perhaps more theoretical than practical. If, however, such a position should arise it may be (I say no more) that the husband would be barred from obtaining the discharge of an order for maintenance which was in force against him under the ancient rule that no man can take advantage of his own wrong.

---

[24] [1903] 2 K.B. 270.

Apart from considerations such as that to which I have just referred, the only arguments which can really be adduced against what I venture to think is the plain construction of section 7 are founded either on hardship to the wife or on the historical background of the legislation. I am not greatly impressed by the suggested hardship; for an adulterous wife who is deprived of her maintenance under section 7 can, if her adultery has been condoned, apply for a fresh order under section 4. However that may be, if the meaning and effect of legislation are reasonably clear, considerations of hardship cannot justify the court in adopting a construction which is not in accord with the language used: *Wankie Colliery Co. Ltd.* v. *Inland Revenue Commissioners*,[25] *per* Lord Sterndale M.R. The historical argument, however, is more formidable, and its cogency is apparent from the judgment which Hodson L.J. has delivered. Nevertheless, I am unable for myself to avoid the conclusion that it is on the language of the Act of 1895, as amended in 1925, that this appeal falls to be determined; and it appears to me that as that language is not fairly open to any construction other than that which I have suggested it is not permissible to depart from it, notwithstanding the forceful considerations to which Hodson L.J. has referred.

I would accordingly allow the appeal.

Appeal allowed.
Order of Divisional Court set aside.
Leave to appeal to the House of Lords.

Solicitors: *Lucien A. Isaacs & Maxwell Simon, for Arthur Goldberg, Plymouth; Evelyn Jones & Co. for Gowman, Easterbrook & Co., Paignton.*

A. W. G.

---

[25] [1921] 3 K.B. 344, 355, 356; 37 T.L.R. 738.

CHARD *v.* CHARD (*orse.* NORTHCOTT), HOYE, WINSTANLEY, LORD AND NORRIS. TICKNER INTERVENING.

1955
Nov. 4, 7, 18.

Sachs J.

Husband and Wife—Marriage—Validity—Second marriage—Former wife not heard of for sixteen years—Presumptions of continuance of life and of death—Both presumptions of fact.
Presumption—Rebuttable—Death.

A wife who was party to a marriage in 1909 was last heard of in 1917 as a normally healthy woman who would, in 1933, have attained the age of 44. She had reasons for not wishing to be heard of by the husband and his family and it was not possible to trace anyone who, since 1917, would naturally have heard of her. No trace of the registration of her death could be found. The husband having remarried in 1933, he and the 1933 wife sought decrees of nullity:—

Held, that, (1) the court could not accept the 1933 marriage certificate as evidence of the validity of the marriage and was put on inquiry as to the possibility of the 1909 wife being alive in 1933.

Tweney v. *Tweney* [1946] P. 180; 62 T.L.R. 266; [1946] 1 All E.R. 564, as explained in *In re Peete* [1952] 2 T.L.R. 383; [1952] 2 All E.R. 599 and *In re Watkins* [1953] 1 W.L.R. 1323; [1953] 2 All E.R. 1113 followed.

(2) In considering whether the presumption of continuance of life or of death applied, caution was to be exercised with regard to decisions and dicta derived from cases arising under statutory provisions enacting a convenient rule for particular matters.

(3) Any presumption as to the continuance of life was one of fact.

Rex v. *Lumley* (1869) L.R. 1 C.C.R. 196; *MacDarmaid* v. *Attorney-General* [1950] P. 218; 66 T.L.R. (Pt. 1) 543; [1950] 1 All E.R. 497 and *Rex* v. *Inhabitants of Harborne* (1835) 2 Ad. & El. 540 applied.

Dicta of Lord Denman in *Nepean* v. *Doe* d. *Knight* (1837) 2 M. & W. 894 not followed.

(4) Whether or not death was to be presumed is, generally speaking, a question of fact.

In re Watkins [1953] 1 W.L.R. 1323; [1953] 2 All E.R. 1113 and *Prudential Assurance Co.* v. *Edmonds* (1877) 2 App.Cas. 487 applied.

In re Phené's Trusts (1870) L.R. 5 Ch. 139; *Bradshaw* v. *Bradshaw*, post, p. 274n., and *Chipchase* v. *Chipchase* [1939] P. 391; 55 T.L.R. 1067; [1939] 3 All E.R. 895 considered.

(5) The inference as to the life or death of the 1909 wife, therefore, fell to be drawn from the facts of the present case. The correct inference being that she was alive in 1933, decrees of nullity must be granted.

Per curiam. In cases of seven years' absence, where no statute applied, on proof (1) that there were persons who would be likely to have heard of the missing person over that period; (2) that those persons had not heard of him; (3) that all due inquiries appropriate to the circumstances had been made, in the absence of affirmative evidence of life during the relevant period, a presumption of law arose that the missing person died at some time within the seven-year period; such presumption did not affect the present case because there were no such persons.

DEFENDED PETITION, both parties praying for a decree of nullity or, in the alternative, of divorce.

The following statement of facts is taken substantially from the judgment:

The parties went through a ceremony of marriage at the Bristol Register Office on May 15, 1933, during one of the relatively rare and relatively short periods when the husband was not in prison, the husband declaring himself to be a widower.

The present cause was initiated by the husband on January 23, 1952, when he filed his petition alleging desertion by the wife from about November, 1933, and also her adultery with two co-respondents: as to the first the adultery was alleged in 1935, and as to the second, with whom the wife had gone through a ceremony of marriage in which she described herself as a spinster, in 1940 and 1941. By an amendment of September 11, 1952, he alleged also adultery with the third co-respondent in 1940 and with the fourth co-respondent from 1949 onwards.

By her answer of December 1, 1952, the wife admitted the adultery with the first and second co-respondents, but alleged it to have been condoned; denied adultery with the third and fourth co-respondents, and alleged against the husband adultery in 1946 with a woman cited, the husband having gone through a ceremony of marriage with this woman describing himself as a bachelor, and with another woman cited in 1950 and 1951. She also alleged against her husband desertion from February, 1950.

In 1954, however, those who represented the husband found some correspondence of November, 1933, written by the husband when he was in prison, raising a doubt whether a woman whom the husband had married in 1909 was in fact dead in May, 1933, the date of his second marriage. They accordingly instituted thorough inquiries and, on January 31, 1955, re-amended the petition by alleging that the husband's 1909 wife was alive in 1933 and that the latter marriage was accordingly a nullity. The wife's advisers followed suit, and by her amended answer of February 25, 1955, she also alleged that the 1933 marriage was null and void.

At the time of the 1909 marriage the first wife, Rose Margaret Chard née Lewis, was aged about 18, and not 22 as falsely stated to the registrar. There were two children of that marriage, both of whom were cared for first, at an early stage, by the husband's mother and later at Dr. Barnardo's Homes. In 1923 they emigrated to Canada, and attempts to get in touch with them in 1954 proved fruitless.

Between October, 1909, and August, 1912, the husband was, on six separate occasions, sentenced to terms of imprisonment, the last of these being a sentence of four years' penal servitude on July 31, 1912. In 1915 the husband, whilst at liberty for some seven weeks, enlisted in the Army and saw his 1909 wife on two occasions. In mid-1917 he had another short spell of liberty from prison, and his 1909 wife was then working at Wakefield in Yorkshire and appeared to have been drawing marriage allowance. On October 9, 1917, the husband was sentenced to three years' penal servitude. From October 31 to November 5, 1917, the wife was for one week in the Wakefield workhouse under the name of Chard.

From October, 1917, to April 23, 1933, the husband was in prison continuously, save for three occasions when he was at liberty for periods none of which exceeded six weeks. During that period there was no evidence that he heard from his 1909 wife.

While thus in prison he received letters from the 1933 wife and met her for the first time either when she visited him in prison or just after his release. Pursuant to arrangements then made a marriage was in fact celebrated between them on May 15, 1933.

So far as could be ascertained, the 1909 wife was an orphan with no known parents, no brothers or sisters, and no known relatives. Investigations in the present proceedings brought to light the record of what might have been a bigamous marriage in 1913, in the locality in which the 1909 wife might well have been then living, to one Edmund Louis Woods of one Rosina Margaret Lewis, whose age corresponded closely with that of the Rose Margaret Lewis of the 1909 marriage, whose signature had points of distinct resemblance to that of Rose Margaret Lewis, and whose absence of stated parentage in the 1913 marriage certificate corresponded with a similar absence in the 1909 marriage certificate.

Apart from that, there was no person whatsoever known to her 1909 husband with whom she would be likely to have kept in touch; and she might have had good reason for not wishing to appear connected with a man who spent his life continuously in prison, or with any of his relatives. There was no affirmative evidence of her being alive during those 16 years; on the other hand, full and careful searches at Somerset House disclosed no trace between those years of the death being registered of any person under the names of Rose Margaret Lewis, Rose Margaret Chard, or Rosina Margaret Lewis or Rosina Margaret Woods—the last name being that under which she might have been going by virtue of the possible 1913 marriage. At one stage there was a suggestion that the 1909 wife might have died at Wakefield in the influenza epidemic of 1917, but there was nothing at all in the way of evidence to support this theory—and at the trial it turned out to be the merest speculation fostered by the husband or his mother.

The only affirmative evidence of the 1909 wife being alive in 1933 was to be found in some letters which the husband wrote whilst in prison awaiting the trial on November 21, 1933, upon which he was sentenced to three years' penal servitude to be followed by five years' preventive detention. In one of those letters he wrote to the wife on November 7, 1933: "I know you "worried a great deal concerning whether or not our marriage "was valid. Well, Violet, all as I can say is you are perfectly "free to marry again should you wish to do so; as I saw my "first wife, Rose, not long since and know she was alive when "I married you."

Of this statement the husband, when in the witness box, said that it was wholly untrue that he had at any time since 1915 seen the 1909 wife and wholly untrue that when he remarried he knew she was alive. He gave as his reason for making this and other untrue statements whilst awaiting trial in 1933 that he wished to help his wife to freedom when he realized that a long sentence was awaiting him.

During the 16 years from October 2, 1933, to September 1, 1949, the husband was in custody or in prison except for 10 months and heard nothing of the 1909 wife.

K. Bruce Campbell for the husband and the intervener. In this case the first wife was last heard of in 1917 and, in fact, has not been heard of since. The question which the court has to decide is whether she was alive or dead in 1933 when the husband married for the second time. In this complete absence of information two conflicting presumptions can apply, namely, that a person known to be alive at a certain date is presumed to continue to live unless the contrary is shown, and that a person who has not been heard of for seven years is presumed to be dead. It is necessary to consider whether either of these presumptions is a conclusive or rebuttable presumption of law or whether they are both merely presumptions of fact.

It is submitted that both are presumptions of fact. This is borne out by the many criminal cases in which, on a charge of bigamy, it has been held that the fact that a first wife has been shown to be alive at a certain date may raise these presumptions, and that it is then for the jury to determine the matter, thus showing that both presumptions are of fact and not of law. If they were of law they could not be left to the jury. [*Rex* v. *Lumley*[1] and *Reg.* v. *Willshire*[2] were referred to.] In *Reg.* v. *Jones*[3] there was evidence as to the first marriage but no evidence of its cessation. It was held that the presumption of continuance applied, although it could have been displaced if suitable evidence had been forthcoming. The presumption of continuance was there clearly regarded as one of fact which ran against the prisoner. In *Reg.* v. *Curgurwen*,[4] where the prisoner was able to adduce evidence of facts which showed that he had been separated from his first wife for some eight years and had not seen or heard from her, the decision was the reverse.

[SACHS J. Is it not true that every case must depend to a large extent upon its own facts? If there is absolutely no other evidence is it not a question of fact whether the right presumption is that a person is alive or dead?]

That is so, and in this case one can certainly say that if the first wife was dead by 1933, she did not die of old age.

There is no presumption of law that a person who has not been heard of for seven years is dead nor that life continues for an indefinite period: *Hopewell* v. *De Pinna*[5]; *In re Phené's Trusts*[6]; *Rex* v. *Inhabitants of Harborne*[7] and *MacDarmaid* v. *Attorney-General.*[8]

All that was held in *Tweney* v. *Tweney*[9] was that a marriage which had taken place according to the required formalities was to be presumed to be valid until facts to the contrary were adduced. None of the earlier cases were referred to except *Spurgeon* v. *Spurgeon*,[10] which was an undefended case.

---

[1] (1869) L.R. 1 C.C.R. 196.
[2] (1881) 6 Q.B.D. 366.
[3] (1883) 11 Q.B.D. 118.
[4] (1865) L.R. 1 C.C.R. 1.
[5] (1809) 2 Camp. 113.
[6] (1870) L.R. 5 Ch. 139.
[7] (1835) 2 Ad. & El. 540.
[8] [1950] P. 218; 66 T.L.R. (Pt. 1) 543; [1950] 1 All E.R. 497.
[9] [1946] P. 180; 62 T.L.R. 266; [1946] 1 All E.R. 564.

Several other cases decided in the Divorce Division appear to support the proposition that there is no presumption of death after seven years where there are facts to account for the person not having been heard of (*Ivett* v. *Ivett*[11]) or an even longer period if inquiries which might lead to information as to his existence have not been made: *Bradshaw* v. *Bradshaw*,[12] in which *Deakin* v. *Deakin*[13] was applied. In *Hogton* v. *Hogton*,[14] moreover, where the question was whether death could be presumed after six years, the decision appears to have turned on the inferences to be drawn from the facts of the case.

It is submitted that on the facts of the present case the presumption which arises is that of continuance of life and not of death.

R. L. Bayne-Powell and *E. R. Moulton-Barrett* for the wife. The first wife was last heard of in 1917. There is a presumption of law that a state of affairs proved to exist continues. It is a presumption which applies over a very long period and can endure over half-a-century, and is not confined to short periods such as those in *Reg.* v. *Willshire*[15] and *Reg.* v. *Jones*.[16] For examples see Taylor on Evidence, in which the presumption is said to be one of law.[17]

There is a presumption of fact that a person who has not been heard of for seven years is dead. But this presumption only arises where it is proved that those likely to hear of that person have not heard of him and inquiries do not show anything in favour of his continued existence. It is said that *Tweney* v. *Tweney*[18] is authority for the proposition that a marriage which has taken place according to the required formalities is presumed to be valid. It is submitted that the true effect of *Tweney* v. *Tweney*,[19] when taken in conjunction with *In re Peete*[20] and *In re Watkins*,[21] in which it was considered, is that the moment that some evidence is given which causes doubt as to the validity of the marriage the presumption of validity disappears. All that *Tweney* v. *Tweney*[22] really amounts to is that a person who is in possession of a marriage certificate is deemed to be the person named therein.

---

[10] (1930) 46 T.L.R. 396.

[11] (1930) 94 J.P. 237.

[12] Post, p. 274.

[13] (1869) 33 J.P. 805.

[14] (1933) 50 T.L.R. 18.

[15] 6 Q.B.D. 366.

[16] 11 Q.B.D. 118.

[17] 12th ed., para. 196 et seq.

[18] [1946] P. 180.

[19] Ibid.

[20] [1952] 2 T.L.R. 383; [1952] 2 All E.R. 599.

[21] [1953] 1 W.L.R. 1323; [1953] 2 All E.R. 1113.

[22] [1946] P. 180.

In *Nepean* v. *Doe* d. *Knight*[23] Lord Denman C.J. stated obiter that the presumptions of continuance and of death after not being heard of for seven years were presumptions of law, but that was an action for ejectment and was a case decided on very special circumstances; moreover, it must be considered in conjunction with the judgment of Lord Blackburn in *Prudential Assurance Co.* v. *Edmonds*,[24] in which he said that in order to raise a presumption of death the failure to hear of a person must be by those who would be likely to hear of him. That case is relied on as particularly applicable to the present circumstances, for the facts here were such that the husband and his relatives would not have been likely to hear of the first wife, nor, indeed, has it been possible to find persons in that category. The presumption of death cannot, therefore, arise and that of continuance prevails.

K. Bruce Campbell in reply. At the time when the presumptions of life and death were first applied, and when many of the older authorities upon them were decided, the possibility of communication between different parts of the globe was very different from that of the present century; neither was there a system of registration of births and deaths or a correlative duty on the citizen to supply such information. It is submitted that this great change in circumstances renders unnecessary presumptions of law as to life and death if they ever were so.

A. Gordon Friend for the co-respondent Lord.

John Hazel for the co-respondent Norris.

The other co-respondents did not appear and were not represented.

Cur. adv. vult.

SACHS J., reading his judgment, said: This cause has certain unusual aspects, and at the outset I wish to express my gratitude to both counsel for the way in which they have conducted the trial and the care with which they have laid before me the relevant—and not always wholly consistent—authorities. I note, too, that all this work has been done by experienced counsel under the Law Society (Divorce Department) scheme under which they receive only token remuneration.

[His Lordship referred to the pleadings and continued:] As both parties upon the trial before me sought in unison to have

---

[23] (1837) 2 M. & W. 894.

[24] (1877) 2 App.Cas. 487.

1955

CHARD v. CHARD.

Sachs J.

the 1933 marriage declared null, and as the validity of three other ceremonies was also involved, I considered calling in the Queen's Proctor. But the very helpful manner in which counsel put forward all angles of the matters in issue enabled me to avoid putting the country to yet further expense in relation to this matter.

The issue as to whether the 1933 marriage is null and void has to be considered from two different lines of approach. The first is in relation to statements by the husband as to his 1909 wife having been, to his knowledge, alive in 1933; the second is on the footing of the above statements being disregarded, in which case one has to deal with the matter on the footing that from 1917 to 1933, a matter of some 15 or 16 years, there is no positive evidence one way or the other as to the 1909 wife being alive or dead.

[His Lordship referred to the correspondence of November, 1933, and the husband's evidence upon it, and remarked:] Any statement of the husband, whether in writing or oral, has, of course, to be assessed on the basis that in matters of status this court only acts upon evidence that is cogent and convincing: see *Preston-Jones* v. *Preston-Jones*.[1] Neither counsel felt able to ask me to place reliance on any passages in the 1933 correspondence. In view of the nature of his record, which includes sentences for at any rate 19 offences of obtaining money by false pretences, it is obviously impossible to attach credence to anything the husband writes or says: indeed, the wife appears to have used an apt phrase in the witness-box when she stated: "untruths just pour off his tongue." Accordingly I must, and do, disregard the husband's statements in his letters, and there is thus no affirmative evidence before me of the 1909 wife being alive after 1917.

Turning, then, to the second line of approach, the facts from which inferences can be drawn are as follows: [His Lordship then alluded to the known history of the parties to the 1909 marriage between that date and 1933, and continued:] The position may accordingly be summarized by stating that there is no evidence as between 1917 and 1933 of the 1909 wife being otherwise than a normally healthy woman who would have attained in the latter year the age of 44.

Upon the facts so far stated it is clear that the present is one of those cases where the court cannot accept the 1933 marriage certificate as necessarily binding, but must examine the possibility of the 1909 wife still then being alive. The court is put upon its inquiry upon the principle stated by Pilcher J. in *Twency* v. *Twency*,[2] and explained by Roxburgh J. and Harman J. in their respective judgments in *In re Peele*[3] and *In re Watkins*.[4]

---

[1] [1951] A.C. 391, 417; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

But what, on that footing, is the correct angle from which to approach the question of deciding whether or not she was alive in 1933? Is there a prima facie presumption of continuing life which has not been rebutted? Is there, in this case, a presumption of death after seven years? Or is the matter one in which the court has to draw inferences from the known facts in the same way as a jury charged with deciding the balance of probabilities?

There have been a considerable number of decisions touching these questions of law in each Division of the High Court. Many of these have concerned cases where some statute has laid down the conditions upon which the court shall, prima facie, presume death; for instance:

(1) 19 Car. II, c. 6 (now referred to as 18 & 19 Car. II, c. 11, or the Cestui Que Vie Act, 1666—and still surviving in so far as it is here set out)—" An Act for redress of inconveniences " by want of proof of the deceases of persons beyond the seas or " absenting themselves, upon whose lives estates do depend "—which enacts: " II . . . if such person or persons . . . shall remain " beyond the seas, or elsewhere absent themselves in this realm, " by the space of seven years together, and no sufficient and " evident proof be made of the lives of such person or persons " respectively . . . the person or persons upon whose life or lives " such estate depended, shall be accounted as naturally dead."

(2) The Offences against the Person Act, 1861, section 57 (Bigamy)—" Provided that nothing in this section contained shall " extend . . . to any person marrying a second time whose husband " or wife shall have been continually absent from such person for " the space of seven years then last past, and shall not have " been known by such person to be living within that time." This was the third of a line of statutory provisions relating to bigamy: 1 Jac. I, c. 11, section 2 was more on the lines of 19 Car. II, c. 6, above.

[2] [1946] P. 180, 183; 62 T.L.R. 266; [1946] 1 All E.R. 564.

[3] [1952] 2 T.L.R. 383; [1952] 2 All E.R. 599.

[4] [1953] 1 W.L.R. 1323, 1326; [1953] 2 All E.R. 1113.

(3) The Matrimonial Causes Act, 1950, section 16 (2): "... "the fact that for a period of seven years or upwards the other "party to the marriage has been continuously absent from the "petitioner, and the petitioner has no reason to believe that "the other party has been living within that time, shall be "evidence that he or she is dead until the contrary is proved."

Considerable caution has to be exercised when considering decisions and dicta which were concerned with presumptions arising in cases to which such statutes applied, the more so because sometimes the words used in the judgments appear to state a general rule applicable to all types of cases. It must also be noted that the above statutory provisions were enacted in order to provide a convenient rule for particular matters.

In particular, caution is needed when examining dicta in the much quoted *Nepean* v. *Doe*. d. *Knight*[5] as reported in the Exchequer Chamber. That was a case to which the above set out provisions of 19 Car. II, c. 6, applied (*per* Lord Denman[6]). Neither in the Exchequer Chamber nor in the court below was it ever suggested otherwise than that Mathew Knight (the joint life copyholder of certain tenements, including one bearing the aptly litigious name of "Roofless Living") must be presumed dead under the provisions of the statute on the lapse of seven years from 1807; and the question for decision (apart from points as to the doctrine of adverse possession) was as to whether the presumption of law laid down by statute applied to any particular date in these seven years. The court ruled that the time of death, when material, must be "the subject of "distinct proof."

In relation to matters such as the present, to which no statute applies, counsel before me have helpfully discussed whether there is applicable any presumption of continuing life or any presumption of death after seven years.

Before going further into dicta which were said to conflict on these points, it is to be observed that in the main presumptions fall, of course, into three categories. There are rebuttable presumptions of fact, which are no more than inferences logically drawn from one fact as to the existence of other facts—as exemplified by the res ipsa loquitur cases: there are rebuttable presumptions of law (such as that of the innocence of adults and that in the above set out section 16 (2) of the Matrimonial Causes Act, 1950): and there are conclusive presumptions of

---

[5] (1837) 2 M. & W. 894.

[6] Ibid. 912.

1955

CHARD
v.
CHARD.

Sachs J.

law (e.g., the innocence of a child under eight). As Phipson [7] remarks, the demarcation lines between classes of presumption are, even when visible, not always regarded in the dicta of judges and textbook writers.

Taking first what is termed the "presumption of continuance "of life"—this is stated in Phipson on Evidence [8] to be one of fact, whilst Taylor on Evidence [9] treats it as a presumption of law. As between these two views I have no hesitation in holding that the former is the correct one. That would tally with the statement by Lush J. when he in *Rex* v. *Lumley* [10] delivered the judgment of the court (Kelly C.B., Byles J., Lush J. and Brett J., and Cleasby B.) as follows: "The existence of the "party at an antecedent period may or may not afford a "reasonable inference that he was living at the subsequent "date. . . . Thus the question is entirely for the jury. The "law makes no presumption either way." Similarly it would conform with the statement of Hodson J. in *MacDarmaid* v. *Attorney-General* [11] that "There is no presumption of law as to "continuance of life, but each case must be determined on its "own facts."

In view of the misapprehension which it appears to have caused in one or two later cases, I should mention that Lord Denman's statement in *Nepean's* case [12]: "It is true, the law "presumes that a person shown to be alive at a given time "remains alive until the contrary be shown . . ." conflicts, on the face of it, with his own statement two years earlier in *Rex* v. *Inhabitants of Harborne* [13]: "I must take this opportunity of "saying, that nothing can be more absurd than the notion, that "there is to be any rigid presumption of law on such questions "of fact, without reference to accompanying circumstances, such, "for instance, as the age or health of the party.", and, later on [14]: ". . . the only questions in such cases are, what evidence "is admissible, and what inference may fairly be drawn from it." It is the latter proposition upon which Hodson J. founded his above cited statement [15] "there is no presumption of law as to "continuance of life."

On the basis, which I have adopted, that any presumption of continuance of life is simply one of fact, the various decisions cited to me and the dicta therein become reconciled. Further, due weight can thus be given in each case to the different circumstances of any given individual, e.g., whether a friendless orphan or a gregarious man in public life, whether in good or in bad health, and whether following a quiet or a dangerous occupation.

---

[7] 9th ed., p. 699.
[8] 9th ed., p. 702.
[9] 12th ed., para. 196 et seq..
[10] (1869) L.R. 1 C.C.R. 196.
[11] [1950] P. 218, 221; 66 T.L.R. (Pt. 1) 543; [1950] 1 All E.R. 497.
[12] 2 M. & W. 894, 913.
[13] (1835) 2 Ad. & El. 540, 544.
[14] Ibid. 545.
[15] [1950] P. 218, 221.

Turning next to the question as to presumptions of death (whether before or after a lapse of seven years) the same reasoning to my mind generally applies—save in one set of circumstances to which I will refer later. I respectfully agree with Harman J.'s conclusion in *In re Watkins* [16] that, where no statute applies, there is no "magic" in the mere fact of a period of seven years elapsing without there being positive evidence of a person being alive. It is, generally speaking, a matter in each case of taking the facts as a whole and of balancing, as a jury would, the respective probabilities of life continuing and having ceased.

That line of approach was adopted by Harman J. in the case cited when holding, on the facts, that death was to be presumed in the relevant 26 years.[17] A similar approach was adopted by the Divisional Court (Lord Merriman P. and Collingwood J.) in their decision in *Bradshaw* v. *Bradshaw*.[18] There the court, upon the facts, declined to accede to the plea of a wife that her first husband be presumed dead by 1940—where, on the one hand, she had not then heard from him for some 19 years, but, on the other hand, had made no inquiries in that period. Similarly, the decisions of the Divisional Courts in *Ivett* v. *Ivett*,[19] where Hill J. and Bateson J. were not prepared to assume death after the lapse of some seven years when there were facts which could account for the husband not being heard of, and in *Hogton* v. *Hogton*,[20] where, on the other hand, death within six years was presumed, both appear in the upshot to have turned on the question as to "what were the proper inferences to be "drawn from established facts." If any dicta in the rather unusual case of *In re Phené's Trusts* [21] tend in a contrary direction, then they seem to me to run counter to the general stream of authority. There it was sought to make title to a share in a residuary estate by establishing that Nicholas Phené Hill was alive on January 5, 1861, but on the facts in that case it was held that a United States marine sergeant in good health, who disappeared when on leave from his ship and was then not heard of for more than seven years, was not "proved affirmatively to have "survived" seven months from the time his leave was up, though it was also stated that the court would have inferred that he died whilst on leave during those seven months.

---

[16] [1953] 1 W.L.R. 1323.

[17] Ibid. 1330.

[18] Post, p. 274.

[19] (1930) 94 J.P. 237.

[20] (1933) 50 T.L.R. 18.

[21] (1870) L.R. 5 Ch. 139.

At this point I should mention that the decision in *Bradshaw* v. *Bradshaw*[22] (Mr. Campbell helpfully put before me the full terms of the judgment and details of the cases cited) might at first sight appear to conflict with certain passages in the judgment in *Chipchase* v. *Chipchase*[23] if those latter passages were both taken too literally and were intended to apply beyond the particular facts there under consideration. In the *Chipchase* case[24] a lapse of 12 years was being discussed, the wife again being, as in *Bradshaw's* case, the sole witness to the husband not having been heard of, and Sir Boyd Merriman P., when referring to "the presumption which arises in circumstances of this kind," stated[25]: "That presumption—I am taking the statement of it "from the judgment of Giffard L.J. in *In re Phené's Trusts*[26]— "is that the law presumes a person who has not been heard of "for over seven years to be dead. . . ." Henn Collins J. said[27]: "As soon as it was established . . . that the former husband . . . "had not been heard of for seven years, then undoubtedly there "was evidence for their consideration that he was dead, and it "was more than evidence because it was a presumption and "conclusive evidence until rebutted by evidence which showed, "in fact, that he was alive."

In neither of these passages is there added after the words "heard of" a phrase such as "by persons who would naturally "have heard of him, if alive," (*per* Hodson J. in *MacDarmaid's* case[28]). *Chipchase's* case[29] was, however, cited in *Bradshaw's* case[30] and not there commented upon, and to my mind there is no conflict between them. The passages above set out related to the facts of the particular case and are to be construed on the footing that the words "heard of" were used in that particular sense which Lord Blackburn analysed in his speech in *Prudential Assurance Co.* v. *Edmonds*[31] where, after referring to the necessity for inquiries and searches, he concluded[32]: "in order to "raise a presumption that a man is dead from his not having

---

[22] Post, p. 274.
[23] [1939] P. 391; 55 T.L.R. 1067; [1939] 3 All E.R. 895.
[24] Ibid.
[25] [1939] P. 391, 393.
[26] L.R. 5 Ch. 139.
[27] [1939] P. 391, 399.
[28] [1950] P. 218, 220.
[29] [1939] P. 391.
[30] Post, p. 274.
[31] (1877) 2 App.Cas. 487.
[32] Ibid. 509.

"been heard of for seven years, you must inquire amongst those "who, if he was alive, would be likely to hear of him, and see "whether or no there has been *such an absence of hearing of* "*him*" (the italics are mine) "as would raise the presumption "that he was dead."

Were I, however, to be wrong in my conclusion as to there being no conflict, then I would have elected to follow *Bradshaw's* case,[33] especially as a full range of authorities, including *In re Watkins*,[34] were there laid before the court, whilst in *Chipchase's* case [35] apparently the only authority to which the court was referred was *In re Phené's Trust* [36]: and there the judgment not being concerned with the precise point now under consideration, the reference to the presumption was made in terms of the type which later attracted examination by Lord Blackburn (see also *In re Watkins* [34]).

My view is thus that in matters where no statute lays down an applicable rule, the issue of whether a person is, or is not to be presumed dead, is generally speaking one of fact and not subject to a presumption of law.

To that there is an exception which can be assumed without affecting the present case. By virtue of a long sequence of judicial statements, which either assert or assume such a rule, it appears accepted that there is a convenient presumption of law applicable to certain cases of seven years' absence where no statute applies. That presumption in its modern shape takes effect (without examining its terms too exactly) substantially as follows. Where as regards "A.B." there is no acceptable affirmative evidence that he was alive at some time during a continuous period of seven years or more, then if it can be proved first, that there are persons who would be likely to have heard of him over that period, secondly that those persons have not heard of him, and thirdly that all due inquiries have been made appropriate to the circumstances, "A.B." will be presumed to have died at some time within that period. (Such a presumption would, of course be one of law, and could not be one of fact, because there can hardly be a logical inference from any particular set of facts that a man had not died within 2,555 days but had died within 2,560.)

Mr. Campbell has cogently argued that the greater regimentation and registration of our lives and deaths in 1955 now renders unrealistic any such general presumption, at any rate where a death certificate could be expected to be found but is not; and has suggested that as the dicta really originate from judgments of the first half of last century when the presumption of continuing life was also regarded as one of law, they too are now suspect. Further, it appears on examination that some of the above dicta derive either from some case such as *Nepean's* case,[37] to which some statute applied, and that others, as in *MacDarmaid's* case,[38] were based on earlier judgments in such cases. Against that, however, one can point to yet others, e.g., Lord Ellenborough in *Hopewell* v. *de Pinna*,[39] and Lord Blackburn's speech in *Prudential Assurance Co.* v. *Edmunds*,[40] where there is no apparent trace of such an origin: and the rule has even been said to have been traced back before the statute of James I, e.g., to *Thorne* v. *Rolff*.[41] (See the useful discussion of the rule and its older shapes in the 1890 articles in 34 Solicitors' Journal.[42]) It is, however, not necessary for me to deal further with the questions raised by Mr. Campbell because in the present case there is no one who has been shown to have been likely to have heard from the 1909 wife in the years 1917 to 1933 or, indeed, from 1933 to date and so such a rule could not operate.

---

[33] Post, p. 274.

[34] [1953] 1 W.L.R. 1323.

[35] [1939] P. 391.

[36] L.R. 5 Ch. 139.

The present case is thus one where there is no suggestion that in 1917 the 1909 wife was other than a woman of normal health, nor any evidence of any fact by reason of which her expectation of life could be regarded as greatly sub-normal. There are many factors which, as previously mentioned, might have led her not to wish to be heard of by the prisoner or his family, there is no one known who would naturally have heard of her, and there is no registration of a relevant death.

I accordingly approach the matter on the footing (1) that this is a case in which the court is put upon inquiry as to the validity of the 1933 marriage; (2) that once the husband was shown to have contracted the 1909 marriage it is for him (or his present wife) to prove facts from which a cessation before May 18, 1933, of the earlier marriage can be inferred before it can be said that the 1933 marriage is valid (see *MacDarmaid's* case [43]); (3) that there is in the present case no presumption of law either as to the continuance of life or as to death having supervened; (4) that this is thus one of the class of cases which has to be determined on its own facts.

---

[37] 2 M. & W. 894.

[38] [1950] P. 218.

[39] (1809) 2 Camp. 113.

[40] 2 App.Cas. 487, 507.

[41] (1560) 2 Dyer 185a.

[42] p. 247 et seq.

[43] [1950] P. 218, 220.

1955

CHARD v. CHARD.

Sachs J.

Whether the proper way of putting it is to say that there is an obvious presumption of fact that a woman normally continues to live until she is 44, or whether one prefers to look at the matter from the angle of "what are the inferences to be drawn "from the facts as a whole?"—seems to me to be somewhat immaterial. The correct inference in the present case from the known facts is that the 1909 wife was living on May 15, 1933, and not that she was by then dead.

It follows that the 1933 marriage is null, and there will be a decree of nullity both on the prayer in the petition and upon the prayer in the cross answer.

I would add that although there seems to be no reported case in which a spouse has been granted a decree of nullity in respect of his or her own bigamy, the reasoning of Dr. Lushington in *Miles* v. *Chilton* (*orse Miles*),[44] where the husband in effect procured the wife to marry him bigamously, clearly covers the present case.

Decrees nisi of nullity granted to both the petitioner and the respondent.

Solicitors: *Law Society* (*G. F. Wood*); *Law Society* (*L. H. Whitlamsmith*); *J. F. Coules & Co.*; *J. R. Spencer Young.*

E. J.

NOTE.

[PROBATE, ETC., DIVISION.]

BRADSHAW v. BRADSHAW.

1953 *Nov.* 9, 10, 11, 17; *Dec.* 17.

1954 *Jan.* 11, 12, 13, 14; *Mar.* 8.

Lord Merriman P. and Collingwood J.

Husband and Wife—Validity of marriage—Second marriage—Justices—Separation from previous husband—Lack of evidence of previous husband's existence or death—No inquiries made—Onus of proof. Presumption—Rebuttable—Death. Legal Aid—Costs—Taxation—Solicitor—Country solicitor—Attendance.

The parties went through a ceremony of marriage in February, 1940, and in 1950 the wife was granted an order for maintenance by the justices on the ground of desertion. The wife had been married in India in 1916 to one Howard then aged 22. In 1921 Howard had been granted a decree nisi of divorce at Lucknow in an undefended suit on the ground of adultery. This, according to her evidence, was the last occasion on which the wife had seen Howard who was then said to be living with another woman. That decree was rescinded at Allahabad in 1922; the wife, however, was unaware of this and continued to believe that the marriage had been dissolved.

---

[44] (1849) 1 Rob.Ecc. 684.

From a date prior to the divorce proceedings until his death a month or so before the 1940 ceremony the wife lived with one Dennet; and after the decree nisi in 1921 she made no inquiries about Howard nor any attempt to trace him by means of Army records or otherwise.

In 1953, the husband in the present proceedings, who knew about the cohabitation with Dennet, learnt for the first time of the marriage to Howard and learnt also that the decree of 1921 had been rescinded. He applied for, and was granted, a revocation of the order of 1950 on the ground that the wife had not succeeded in proving that she was free to marry him in 1940 and that that marriage was therefore invalid. It was admitted that the information tendered about the marriage in 1916 and the 1921–22 proceedings was "fresh evidence" upon which the justices might act.

The Divisional Court heard full oral evidence by the parties and a witness, and found the facts set out above. The court rejected, however, a statement by the wife that she had been told in 1931 by a sister of Howard, one, Mrs. Turnbull, that Howard had died:—

Held, that although the fact that the wife had not heard from Howard was a matter which must be taken into account, so also must her failure to make any inquiries about him. There was, in the circumstances, therefore, nothing to raise a presumption that Howard had died before the ceremony in 1940. The jurisdiction of justices to deal with the complaints entrusted to them under the Summary Jurisdiction (Married Women) Act, 1895, was derived from the fundamental assumption that they were dealing with persons who could truly be called husband and wife; and the husband was therefore entitled to have the order for maintenance discharged.

Deakin v. *Deakin* (1869) 33 J.P. 805; *Ivett* v. *Ivett* (1930) 94 J.P. 237; *Hogton* v. *Hogton* (1933) 50 T.L.R. 18 applied.

APPEAL by a wife from Darwen justices.

The relevant facts are summarized in the headnote.

The wife appealed from an order of the justices for the Darwen Borough petty sessional division of Lancashire, made on June 22, 1953, discharging an earlier order made by the same court on August 24, 1950, in favour of the wife on the ground that her husband had deserted her. At the same time the court dismissed the application of the wife, adjourned from October 30, 1952, for the enforcement of certain arrears which had accrued due under the original order.

In addition to the order of 1950, and the application to revoke that order in 1953, the husband had unsuccessfully applied on April 12, 1951, and November 15, 1951, for the revocation of the 1950 order on the ground that he was willing to resume cohabitation. The application to revoke was adjourned from November, 1952, to June 22, 1953.

1954

BRADSHAW
v.
BRADSHAW.

Mark B. Smith and *H. S. L. Rigg* for the wife.
J. D. Moylan for the husband.

The following cases were referred to in argument: *MacDarmaid* v. *Attorney-General*[1]; *In re Phenés Trusts*[2]; *Ivett* v. *Ivett*[3]; *In re Watkins*[4]; *Parkinson* v. *Parkinson*[5]; *Chipchase* v. *Chipchase*[6]; *In re Peete*[7]; *Tweney* v. *Tweney*[8]; *Hickman* v. *Peacey.*[9] Reference was also made to Lieck and Morrison's Domestic Proceedings, 1949 ed., at p. 10.

Cur. adv. vult.

March 8. LORD MERRIMAN P. read a judgment in the course of which his Lordship said:—The husband's application to discharge the order was made under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, which, omitting immaterial words, enacts that a court of summary jurisdiction, acting within the petty sessional division in which any order under the Act has been made, may, on the application of the husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, discharge any such order. The cause which the husband attempted to show upon fresh evidence was that the marriage between himself and the wife was invalid. [His Lordship referred to the marriage of 1940 and the previous proceedings in connexion therewith, stating that the substance of the husband's case was that the wife had not been free to marry him because she had previously been married to a man named Howard, of whose existence the husband had first become aware in about 1953, and that there was nothing to show that she was not still married to Howard on February 5, 1940, and continued:]

This case, which I regard as one of considerable difficulty and complexity, has taken a somewhat unusual course. The words of the section already quoted appear to impose, at least in the first instance, upon the husband who is making the application the burden of showing cause for revocation of the order. On the other hand, the grounds of the decision as stated by the justices in the minute of adjudication would appear to put the burden of establishing the validity of the marriage on the wife. That, indeed, is the contention of the husband, for whom it is argued that, once the wife is shown to have been already married, the burden is upon her satisfactorily to account for her freedom from that marriage tie; while, for the wife, it is argued that the marriage being unexceptionable in form and duly consummated, and being admittedly followed by cohabitation for many years' duration, the marriage remains good until some evidence is adduced that the marriage was, in fact, a nullity. (*Tweney* v. *Tweney*,[1] *per* Pilcher J.)

---

[1] [1950] P. 218; 66 T.L.R. (Pt. 1) 543; [1950] 1 All E.R. 497.

[2] (1870) L.R. 5 Ch. 139, 150–151.

[3] (1930) 143 L.T. 680; 94 J.P. 237; 28 L.G.R. 479.

[4] [1953] 1 W.L.R. 1323; [1953] 2 All E.R. 1113.

[5] [1939] P. 346; 55 T.L.R. 860; [1939] 3 All E.R. 108.

[6] [1939] P. 391; 55 T.L.R. 1067; [1939] 3 All E.R. 895.

[7] [1952] W.N. 306; [1952] 2 T.L.R. 383; [1952] 2 All E.R. 599.

[8] [1946] P. 180; 174 L.T. 335; 62 T.L.R. 266; 115 L.J.P. 60; [1946] 1 All E.R. 564.

[9] [1945] A.C. 304; 114 L.J.Ch. 225; 173 L.T. 89; 61 T.L.R. 489; [1945] 2 All E.R. 215.

As each side in turn argues that the burden of proof is decisive in this case it is well to remember that in *Robins* v. *National Trust Company*,[2] Lord Dunedin said [3]: "Now, in conducting any inquiry, "the determining tribunal, be it judge or jury, will often find that "the onus is sometimes on the side of one contending party, sometimes "on the side of the other, or as it is often expressed, that in certain "circumstances the onus shifts. But onus as a determining factor of "the whole case can only arise if the tribunal finds the evidence pro and "con so evenly balanced that it can come to no such conclusion. Then "the onus will determine the matter. But if the tribunal, after "hearing and weighing the evidence, comes to a determinate conclusion, "the onus has nothing to do with it, and need not be further considered." See also *Thomas* v. *Thomas*,[4] *per* Lord Thankerton. [His Lordship referred to the proceedings which had taken place relative to the marriage of the wife and Howard in the District Court in Lucknow and the High Court at Allahabad and to the evidence of the parties given in the proceedings before the Darwin justices and before the Divisional Court and continued:]

The justices, in their reasons, said that they regarded as purely hearsay evidence what the wife said she was told by Mrs. Turnbull. It is true that the evidence about the information obtained by the wife from Mrs. Turnbull would be inadmissible, as hearsay, for the purpose of establishing the fact of Howard's death having actually occurred in 1931. The real significance of that evidence, if accepted, is twofold:—On the one hand it imports that in 1931 the wife learned from a reliable source that Howard had recently been alive, thereby destroying any inference in favour of a presumption of his death having occurred after the lapse of seven years or more from the wife having last seen or heard of Howard in 1921, when they met in the court of the district judge at Lucknow. On the other hand, on the assumption that Howard's sister was the person most likely, if not the only person likely to have heard of him, it could legitimately be regarded as marking the inception of a period thenceforward during which any fresh inquiries by the wife would necessarily be fruitless. In this respect the evidence was admissible to afford in due time the foundation for a presumption of death before the date of the marriage in 1940, but without raising any presumption as to the actual date of the death. (See the judgment of Harman J. in *In re Watkins*,[5] and the cases therein relied upon.) [His Lordship further reviewed the evidence of the parties and continued:]

In the minute of adjudication the justices put the burden upon the wife on the strength of the decision in *Ivett* v. *Ivett*.[6] Both counsel contended that in the last resort the burden of proof must lie upon whoever was the claimant. It is manifest, however, that this might produce an absurd result, which can be illustrated by supposing that on the facts of this case, as would be possible, the wife brought a petition on the ground of desertion, and the husband a cross-petition claiming a decree of nullity. On the first petition, according to the arguments which have been addressed to us, the wife would fail unless she were able to prove affirmatively that on February 5, 1940, she was free of the marriage tie with Howard; while the husband would fail on the nullity petition if he were unable to prove that Howard was actually alive on that same date. Indeed, it might even be that, by parity of reasoning, the wife and the husband must fail, respectively, on the application by her for the enforcement of arrears and the application by him to discharge the order.

---

[1] [1946] P. 180, 182; 62 T.L.R. 266; [1946] 1 All E.R. 564.

[2] [1927] A.C. 515; 43 T.L.R. 243.

[3] [1927] A.C. 515, 520.

[4] [1947] A.C. 484, 487; 63 T.L.R. 314; [1947] 1 All E.R. 582.

[5] [1953] 1 W.L.R. 1323; [1953] 2 All E.R. 1113.

[6] 94 J.P. 237.

I am by no means sure, however, that to decide this case merely by imposing the burden either on the husband or the wife leads to a satisfactory solution, particularly if the burden of proof depends solely on which of the two spouses happens at any given moment to be the complainant or petitioner, or as the case may be. The jurisdiction of justices to deal with the complaints which are entrusted to them under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, is derived from the fundamental assumption that they became husband and wife on February 5, 1940.

The question can be resolved in favour of the jurisdiction of the justices in any one of the following ways:—(a) By proof that the wife and Howard were divorced before February 5, 1940, or by a decree of presumption of Howard's death and dissolution of marriage, pronounced before that date. (b) By proof of Howard's death having occurred before February 5, 1940, which might be either (i) by definite evidence of his death on an earlier date, or (ii) by a decree binding on the parties to that effect, or (iii) by evidence which raises a presumption of the death of Howard at some unspecified time before February 5, 1940, or (c) whatever the actual fact may be, by establishing that the husband is estopped from denying the wife's capacity to marry him on February 5, 1940.

As regards (c), it was expressly disclaimed by the wife's counsel, rightly, in my opinion, that, whether by approbation of that marriage or otherwise—that is to say, with full knowledge of the facts and of the law applicable thereto—there was any such estoppel in this case.

As regards (a), although at more than one stage of this litigation the wife has asserted the existence of a valid decree of divorce, that is effectively disproved by the record of the decree of the High Court at Allahabad setting aside the decree nisi obtained in 1921, and it is clear that no decree of a presumption of death and dissolution of marriage has ever been made. As regards (b) (i), there is no admissible evidence of Howard's death on any specific date.

It follows, therefore, that the jurisdiction of the justices and the validity of the marriage depend upon the establishment, on the evidence as it now stands, of a presumption of Howard's death at some unspecified date before February 5, 1940. In this connexion it seems to me that the decision of Cockburn C.J. and Mellor J. in *Deakin* v. *Deakin* [7] in 1869, for the discovery of which I am indebted to Collingwood J., is illuminating. The case arose under the Poor Law

---

[7] (1869) 33 J.P. 805.

Amendment Act, 1868, s. 33, which enacts that when a married woman requires relief without her husband, the guardians of the parish, etc., to which she becomes chargeable may apply to the justices having jurisdiction in such parish, in petty sessions assembled, and thereupon such justices may summon such husband to appear before them to show cause why an order should not be made upon him to maintain his wife, and may make an order accordingly. As in the case of the code with which we are concerned, the jurisdiction depends upon the existence of the relationship of husband and wife. In that case the defendant husband had been married on December 25, 1849, to the wife who eventually became chargeable to the guardians; and they had lived as husband and wife until the beginning of 1866. They then separated, the husband allowing the wife 5s. a week until August 17, 1867, when the allowance was stopped in the following circumstances:—

The wife had been previously married on November 6, 1840, to a man named James Eakin, a steamboat engineer. In the summer of 1845 he left her in England, stating that he intended to go abroad to get employment and a voyage for the benefit of his health. Two months later the wife received a latter from Eakin, written from Marseilles, stating that he had got a voyage to Gibraltar; but in December, 1845, she received a letter from a resident in Marseilles, telling her that Eakin had died on December 3, 1845, of a black fever; that Eakin had left a few francs in money which he would save for her until she came to Marseilles, and giving an address at which he asked her to communicate with him. The wife's brother wrote, on her behalf, saying that she could not incur the expense or trouble of the journey, and asked the writer to take the money for his kindness in writing. Before the marriage to the defendant husband Moses Deakin in 1849 he (Deakin) showed her an anonymous letter stating that she was a married woman, and asked the wife for proof of Eakin's death, upon which she gave him the letter of December 6, 1845. He told her that he was satisfied, destroyed the anonymous letter, and the marriage took place, as already stated, on December 25 of that year. In July, 1867, the defendant, observing, as it seemed to him, a resemblance between the handwriting of the letter of December 6, 1845, and that of the letter written by Eakin himself in 1843, suspected a fraud, caused inquiries to be made from the prefect at Marseilles, about the supposed death at Marseilles, on December 3 or 4, 1848 (sic), of James Eakin, steamship engineer. It is to be observed in passing that the French correspondent had not stated that Eakin died at Marseilles, and the year of his death was 1845, not 1848: it is not surprising, therefore, that the prefect for the district replied on August 7, 1867, that his researches into the supposed death were fruitless. However, the defendant showed the letter to the wife's brother, and discontinued the allowance, stating that she must prove the burial of her husband. She applied for relief to the parish, thus setting in motion the train which resulted in the summons on the defendant to appear before the justices for Stoke-on-Trent.

It is unnecessary to touch upon the question whether the defendant was exonerated from liability under the Poor Law Amendment Act, 1868, because he had acted bona fide in spite of the fact that the justices regarded his idea of the identity of the handwriting of the two letters as being unfounded; and the justices were further of opinion that the information contained in the letter from the prefect of August 7, 1867, was not necessarily inconsistent with the death of James Eakin as stated in the letter of December 6, 1845, for, among other reasons, it was not stated in that letter that he died in the city of Marseilles and so far from the evidence showing that on December 28, 1869, when they stated the case, the first husband of Anne Deakin was living, the evidence led the justices to the belief that he was then dead.

The justices, finding the facts to be as above stated, and being of opinion that under the Act the question was not one of wilful refusal or neglect, but of legal liability, apart from the belief in the defendant's mind, and that they had jurisdiction in the case, made an order for payment of such weekly sum, as under the circumstances of the case appeared to them to be proper. The question for the opinion of the court was whether, under the above circumstances and on the finding in fact of the justices, they were justified in law in making the order.

For the appellant husband it was argued that there was no evidence that they were legally married, but Cockburn C.J. observed[8]: "There "is the evidence of the actual marriage, and the only question would "be if that is got rid of by the insufficiency of the proof of death of "the former husband." The argument continued that the woman knew that the former husband was alive in 1845, and had married another man in 1849, wherefore the justices were not justified in assuming the death of the first husband between 1845 and 1849. The presumption would be that he was then alive, and if alive the second marriage was void. On which Cockburn C.J. observed[9]: "But the "justices were not dealing with what ought to be presumed in 1849 "but what was to be presumed in 1868. The woman had received "certain information which rendered it not improbable that her former "husband had died in 1845, and there is the fact that he has not been "heard of since." The argument continued that the onus lay on the wife to prove her former husband was dead before she married in 1849; everything must turn on whether she proved the death. The justices were not entitled to assume that death before 1849.

The respondent was not called upon. The judgment of Cockburn C.J. was as follows[10]: "Considering that the inquiry as to the "marriage took place in 1868, I think there was ample evidence "before the justices and that the order is good."

In view of the fact that great reliance has been placed on the decision in *Ivett* v. *Ivett*,[11] it is worth noting that the relation between the two cases of *Deakin* v. *Deakin*,[12] *supra*, and *Ivett* v. *Ivett*[13] was considered by this court in *Hogton* v. *Hogton*[14] (for the discovery of which also I am indebted to Collingwood J.). That was a decision of this court, consisting of Bateson J. and myself in October, 1933.

I do not think it necessary to examine *Ivett* v. *Ivett*[15] in detail. It appears, however, that the justices in a case not dissimilar to the present had decided the case by placing on the husband, who was resisting the making of an order, the onus of proving that the wife's previous husband was alive at the date of the marriage. It is not altogether easy to follow the report. Hill J. is reported as saying [16]: "If the justices were not entitled to put upon the husband the onus "of proving that Holland was dead [sic], then they ought to have "concluded from the wife's evidence that . . . the marriage was void." Hill J. must have intended to say: "the onus of proving that Holland "was alive." However that may be, the conclusion adverse to the wife did not depend only upon her evidence, since affidavit evidence was admitted showing that the wife and her former husband were actually living together at a time which made it impossible to draw a presumption of death from the former husband not having been heard of for the requisite time.

---

[8] 33 J.P. 805, 806.
[9] Ibid.
[10] Ibid.
[11] 94 J.P. 237.
[12] 33 J.P. 805.
[13] 94 J.P. 237.
[14] (1933) 50 T.L.R. 18.
[15] 94 J.P. 237.

Moreover, in *Hogton* v. *Hogton* [17] this court held that the validity of the decision in *Deakin* v. *Deakin* [18] was unaffected by the decision in *Ivett* v. *Ivett* [19] and expressly followed *Deakin* v. *Deakin*.[20] So far as I am aware, neither *Deakin* v. *Deakin* [20] nor *Hogton* v. *Hogton* [21] has been overruled, and the latter case is referred to without disapproval [22] in the last edition of Phipson on Evidence, prepared by the late Sir Roland Burrows. Mutatis mutandis, it seems to me that *Deakin* v. *Deakin* [23] is directly in point in the present case, assuming always that it is established that in 1931, or at any time not less than seven years before the marriage, the wife had heard from a reliable source that Howard was then dead, and that she had never heard of him since. Thus, the information alleged to be obtained from Mrs. Turnbull would take the place of the letter of December 6, 1845, in *Deakin* v. *Deakin* [23]; and, coupled with the subsequent silence, would enable the court in 1954 to hold that Howard died before 1940, and so to deal with these parties on the basis that they truly became husband and wife by the marriage on February 5, 1940.

But the vital point is whether the wife's evidence to that effect can be believed. [His Lordship referred to discrepancies in the wife's evidence and continued:]

As to the wife's story about what she heard about Howard's death from Mrs. Turnbull, assuming there ever was such a person, of which I am by no means sure, I do not believe a word of it. In my opinion it is all moonshine. The story came into existence when the wife's belief in the divorce was shown to be baseless. Unsupported by that story, but accepting as I do that the wife thought that she and Howard were divorced in 1921, she ceased for that very reason to be one of those who would be likely to hear of or from Howard thereafter. Nor does there seem to be any reason why Howard should ever wish to communicate with the wife after 1922. It is true that after the decree nisi was set aside it would have been open to him to bring a fresh petition on the subsequent adultery between the wife and Dennet, of which he was probably well aware. But he had received a plain warning from the Chief Justice that if he did so he would have a good deal to explain. He may well have realized, or been advised, that not only had his conduct in the earlier suit made proof of adultery between the wife and Dennet more difficult, but, even if proved, that it might also lead to the inference that he had connived at the continuance of the adulterous association, if not at its inception. At any rate, it is clear that no fresh proceedings were brought; and if, as the wife suggests, Howard had become interested in another woman, there was the less likelihood of his communicating with the wife.

---

[16] 94 J.P. 237, 238.
[17] 50 T.L.R. 18.
[18] 33 J.P. 805.
[19] 94 J.P. 237.
[20] 33 J.P. 805.
[21] 50 T.L.R. 18.
[22] 9th ed. (1952), p. 701.
[23] 33 J.P. 805.

But the fact that the wife and Howard were unlikely to be in communication with each other is one thing, and the question whether before marrying again she was absolved from making any inquiries about Howard is another. [His Lordship referred to the wife's evidence as to her last meeting with Howard in 1921 and continued:]

To conclude then: The keystone of the wife's case is that in or about the year 1931 she heard not merely from a reliable, but from the only possible, source of information that Howard had died recently within that same year. Rejecting, as I do, her evidence that she had any such information, the position is that the last definite information she had of Howard was that, when she last saw him at the divorce court in 1921, he was still serving as a sergeant in the Ordnance Corps, and was apparently intending to continue in the service; and that his solicitor told her that he had gone away with a woman, with whom he was living at Ambala.

It may very well be that her belief in the divorce was the real reason for her failure to make any inquiries from 1921 onwards through the Ordnance Corps, or any other sources of information to which those inquiries might lead her if Howard had left the Corps meanwhile. But however it may be excused, the failure to make any inquiries remains. After all, even if Howard was no longer serving in 1939 and was not liable to be recalled to the colours when the Second World War broke out, it by no means follows that all trace of him would have been lost by his Corps; not to mention the possibility of inquiries from the firm by which he had formerly been employed, or such inquiries as could have been made in Ambala itself after Dennet and the wife went to live at that place in 1937.

No doubt the fact that the wife has not heard from or of Howard at all up to the present time must be taken into account; but it must be taken into account with the qualification that she has never made any inquiries about him from 1921 onwards, and that, for the reasons already given, there was no reason after 1921 why she should ever expect to hear from Howard, or of him, unless she made inquiries.

Thus, if I may paraphrase Cockburn C.J. in *Deakin* v. *Deakin*,[24] in the absence of the wife having received certain information which rendered it not improbable that her former husband had died in 1931, the fact that he has not been heard of since, even if it might raise a presumption of death having occurred by now, would do nothing to establish the death as having occurred before the date of the marriage in 1940.

For these reasons I am of opinion that the decision of the justices was correct, and that this appeal fails and should be dismissed.

[24] 33 J.P. 805.

1954

BRADSHAW
v.
BRADSHAW.

COLLINGWOOD J. I have had an opportunity, during the course of its preparation, of reading the judgment which has just been delivered by the President, and I agree both with the findings of fact and the conclusions at which my Lord has arrived.

Appeal dismissed.

Solicitors: *Robinson & Bradley for Holdern, Blanthorne & Davies, Blackburn; Vizard, Oldham, Crowder & Cash for Backhouse, Dunkerley & Isherwood, Blackburn.*

NOTE: The parties were both assisted persons; and *Smith* (who cited *W. F. Marshall Ld.* v. *Barnes and Fitzpatrick* [25]) asked the court to indicate that the attendance of the country solicitor, who had assisted the court, was a proper matter for consideration on taxation as between solicitor and client. Difficulties had arisen about certain dates, and about what the parties had said on different occasions, and he (counsel) had asked for the attendance of the country solicitor.

LORD MERRIMAN P. I think that the recollection of both of us is that we were considerably assisted by the recollections of the solicitor who had the actual conduct of the case. Yes, you may both have an expression of our opinion that the attendance of the country solicitor was necessary and desirable in this case.

[No order for costs was made inter partes.]

E. J.

---

[25] [1953] 1 W.L.R. 639; [1953] 2 All E.R. 970.

RUSSELL *v.* RUSSELL.

C. A.

1956
Jan. 31.

Jenkins and Birkett L.JJ.

Husband and Wife — Maintenance — Justices — Divorce — Negotiations pending suit — Undertaking by husband to divorce court not to apply to reduce justices' maintenance order—Public policy—Ouster of justices' jurisdiction—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7.

At the hearing of a husband's divorce suit in April, 1952, the wife, who was defending the suit, but asking for no relief, was not represented by counsel. On the advice of counsel for the husband, given at the request of the court, she amended her answer to cross-pray for a decree of divorce on the husband giving an undertaking that he would not, in the future, apply to have an existing maintenance order, made by justices in favour of the wife, reduced. The wife then gave evidence upon which she was granted a decree nisi. The husband's undertaking, which was addressed to the court and to the wife, was noted on the file, incorporated in the formal decree, and was duly filed, indorsed by his solicitors, in the divorce registry.

The decree was made absolute in September, 1952. In March, 1953, the husband remarried and, in May, 1954, a child of the second marriage was born. In May, 1955, the husband, who had fallen into arrears under the justices' maintenance order, was summoned before the Southampton justices to whom he applied for the reduction of the maintenance order. The justices refused to entertain the matter on the ground of the undertaking given to the High Court. The husband then applied to the commissioner, to whom the undertaking had been given, for its discharge, which application was refused. From this refusal the husband appealed.

At the hearing of the appeal it was argued, on behalf of the husband, that the undertaking was void as contrary to public policy because (*a*) it purported to oust the discretion of the justices to vary maintenance; (*b*) a husband could not validly bind himself to pay his wife a fixed minimum sum by way of maintenance; and (*c*) by accepting the husband's undertaking the court had arrogated to itself control over a matter of maintenance of which the justices were exclusively seized:—

Held, that, (1) there was nothing contrary to public policy in a husband, against whom a justices' order had been made, agreeing with the wife not to apply to have the order reduced below a specified sum, a fortiori when the promise was given by way of an undertaking approved by the court and, therefore, capable, in the proper circumstances, of being discharged by it.

Per Jenkins L.J. As a general proposition it was by no means clear that the rule that a wife could not validly bind herself by an agreement with her husband as to matters of maintenance applied also to a husband; there might, however, be circumstances in which the obligations undertaken by a husband in an agreement as to maintenance in matrimonial proceedings might be so framed or attended with such consequences that it would be proper to hold them contrary to public policy.

Hyman v. *Hyman* [1929] A.C. 601; 45 T.L.R. 444 distinguished.

(2) There had been no usurpation of the jurisdiction of the justices as to maintenance; although the course followed in normal circumstances in divorce proceedings by which a wife, who was already entitled to maintenance under a justices' order, was required to have that order discharged before applying for maintenance in the divorce court was one of practice and convenience, there was no rule of law to that effect and exceptional cases might arise in which there would be no objection, as a matter of law, to the divorce court supplementing the justices' order by an order of its own.

Kilford v. *Kilford* [1947] P. 100; 63 T.L.R. 436; [1947] 2 All E.R. 381 and *Ross* v. *Ross* [1950] P. 160; 66 T.L.R. (Pt. 1) 755; [1950] 1 All E.R. 654 distinguished.

The undertaking given by the husband was, therefore, valid and, in the absence of any change in circumstances giving rise to hardship, the appeal against the refusal to discharge the undertaking should be dismissed.

Per curiam: The history of the undertaking was unfortunate; although nothing improper had been done, the negotiations having been open and in the face of the court, questions of maintenance should not be conducted in such a manner as to savour of bargaining; they should be reserved to be dealt with after the case had been heard and not at a stage at which they might influence the parties in the conduct of proceedings.

Decision of the commissioner affirmed.

APPEAL from Mr. Commissioner Blanco White Q.C.

On August 8, 1947, the wife obtained from the justices at Southend an order for maintenance for herself and the infant child of the marriage, born on May 24, 1947, on the ground of the husband's desertion. The order was for £2 a week for the wife and 10s. for the child. The weekly payment for the wife was subsequently reduced to 30s. On April 24 and 25, 1952, in divorce proceedings before a divorce commissioner the husband petitioned for dissolution of his marriage to the wife on the ground of her cruelty and constructive desertion. The husband on that occasion was represented by counsel; the wife appeared in person. She filed an answer to the petition, but did not include in that answer any cross-prayer for relief. In the course of opening the case, counsel for the husband asked for leave to amend the petition by substituting a reference to desertion for a reference to wilful neglect to maintain the respondent in the paragraph of the petition setting out the proceedings before the justices. In the course of counsel's opening, the commissioner commented: "There is no relief claimed in the answer. That is on purpose, "is it? There seems to be an order in the police court that your "husband deserted. Supposing when I have heard all the "evidence in this case I come to the same conclusion, that your "husband deserted you, will you be wanting a decree of "divorce?", to which the respondent answered "No." (The commissioner): "You do not want to be divorced?" (The respondent): "No. I am just defending the case." In due course his counsel called the petitioner; but, before he embarked on his evidence, counsel said: "It may be unfortunate that "she"—that is the respondent—"has not been able to have "proper advice because she may lose maintenance and things "like that. I do not know and, of course, I am not in a position "to discuss matters with her." (The commissioner): "It is all "very difficult." Then counsel for the husband proceeded with the examination, and it became clear from the evidence that the petitioner's prospects of obtaining a decree on the ground either of cruelty or of constructive desertion were somewhat remote. The commissioner ultimately intervened and said to counsel for the husband: "Do you not think you had better have a conversation with the respondent and point out that she might on "consideration amend her claim?" He then said to the respondent: "You had better talk privately to [counsel for the "husband]." Counsel said "Perhaps the associate will be "there at the same time," and the commissioner agreed. The proceedings were then adjourned to the next day, when counsel said of the respondent: "I spoke to her yesterday and she "has considered the matter and she has decided to amend her "answer. I have written out the amendment, which she has "signed, and handed it to the associate. By the amendment "she alleges that the petitioner has deserted her as from July "24, 1947." (The commissioner): "That is the same date corresponding with the police court order." (Counsel): "Yes, that "is the day that he left the house." The commissioner asked the respondent if she had had an opportunity of considering it. The respondent said "Yes." (The commissioner): "I think, "personally, that the course you have adopted is, under the "circumstances of this case, the course that counsel would "have advised you to adopt if you had had counsel advising "you, because your marriage has really come to an end and "the best thing you can do is to protect your position so far "as money is concerned. Do you follow?" A little later on counsel said: "Mrs. Russell was worried about her maintenance. "She thought if the marriage was dissolved she would probably "lose her maintenance and my client has never wished that at "all, and he is ready to give an undertaking that he will not apply "to have the maintenance of the wife reduced below 30s. She "is already getting that—unless, of course, he is out of work. "He will give an undertaking to that effect and he is also willing "to consent that the maintenance for the child, which is now "10s., should be £1 a week."

The respondent went into the witness-box to prove her case, and counsel for the husband, after he had mentioned the advice which he gave to the respondent and the undertaking that the husband was prepared to enter into, said that, in the circumstances, he did not propose to call further evidence or to cross-examine the respondent. The respondent then formally proved the case necessary to substantiate her claim introduced by amendment for a decree on the ground of desertion. The commissioner commented "I think that proves the case." Counsel said "Yes." Then the commissioner said: "The "prayer of the petition will be rejected, there will be a "decree nisi on the answer on the ground of desertion, and an "order for costs, and the undertaking as to maintenance will be "noted on the file." In fact, the undertaking as to maintenance, as well as being noted on the file, was incorporated in the formal decree. In the form in which it was noted on the file, it was in these terms: "I, Henry Thomas Arthur Russell, of Ferncot, "Stock Road, Billericay, in the County of Essex, the above "named petitioner in these proceedings, hereby undertake that "in the event of my marriage to the respondent, Phyllis Russell, "being dissolved, I shall not apply to have the existing main"tenance order in favour of the respondent for the sum of £1 10s. "weekly reduced unless I am out of work and unable to earn "anything; and that I shall forthwith increase the existing "maintenance order in favour of Christopher Henry Russell, the "child of the marriage between myself and the said respondent, "for 10s. weekly, to the sum of £1, making a total of £2 10s. "in all." It was dated April 25, 1952, signed by the petitioner, and addressed "To this honourable court and to the above-named "respondent." According to an indorsement on the document made by the petitioner's solicitors and initialled "W.P. & E." the undertaking was duly filed in the divorce registry.

The decree was made absolute on September 18, 1952. The petitioner remarried on March 25, 1953, and a child was born of that marriage on May 28, 1954. At the time when the petitioner deserted the respondent, it was quite plain that he was doing so in order to live with another woman, and he must at the time of the divorce proceedings have been anxious to get rid of his wife, the respondent, in order that he might be free to remarry. There was no evidence that the woman he married on March 25, 1953, was the woman for whom he left the respondent.

On May 12, 1955, the petitioner, having fallen into arrears with the maintenance, was summoned to appear before the justices in Southampton, whither he had moved from Southend. He requested a variation of the payments in a downward direction, but he found that he could not successfully do that by reason of the undertaking he had given to the court. On November 14, 1955, he made an application to the commissioner to discharge the undertaking he had given at the hearing of the divorce proceedings between himself and the respondent. On November 21, 1955, the commissioner refused his application. After going briefly into the facts, he said: "I see no ground to "discharge that undertaking. After all, the undertaking was "no doubt the result of conversations with the wife and a wife

" whose marriage has been dissolved may very well want to be " protected, if she can, against the very thing that has happened, " namely, that the husband shall remarry and have some more " children by another woman. However, that is mere specula- " tion. All I know is that this undertaking was volunteered to " the court on the advice of very experienced counsel and I see " no reason to discharge it, nor indeed to vary it, if I had power " to vary it, which I have not. Therefore the application will " be dismissed with costs. There will be the usual order for " taxation on both sides."

From this refusal the petitioner appealed.

T. R. Crawford for the petitioner husband. The commissioner had no jurisdiction to refuse the application to discharge the undertaking, regardless of the merits, because it was void as being contrary to public policy. That proposition is based on three grounds. First, at the time when the undertaking was given the justices, who under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, are given a very wide discretion to vary maintenance, were seized of the matter of the maintenance of this wife and were, therefore, the only persons competent to deal with it, and the undertaking, which improperly fettered their discretion, was contrary to public policy.

Secondly, the undertaking was contrary to public policy because of the decision in *Hyman* v. *Hyman*,[1] the principle in which, as laid down in the judgment of Lord Hailsham L.C.,[2] is that the existence of an agreement between husband and wife as to maintenance is a factor to be considered where the wife exercises her statutory right to apply to the court for maintenance on a divorce but cannot oust the jurisdiction of the court.

[Jenkins L.J. There is nothing in the undertaking to preclude the wife from applying to the justices to increase her maintenance if the means of the husband were substantially increased.]

It is not submitted that the wife is bound by the undertaking but that all matters of maintenance are the concern not only of the parties but of public policy and that for this reason it was wrong to exclude the jurisdiction of the justices by the undertaking . The principle in *Hyman* v. *Hyman* [3] is applicable equally to a husband as to a wife. The undertaking is contrary to public policy because it makes no allowance for any serious reduction in the husband's means. In *Gaisberg* v. *Storr*[4] it was held that a husband was not bound by an agreement as to maintenance made between the parties while proceedings were pending.

---

[1] [1929] A.C. 601; 45 T.L.R. 444.

[2] [1929] A.C. 601, 609.

[3] [1929] A.C. 601.

[JENKINS L.J. The only reason why the husband could not be bound in that case was that the wife could not bind herself because of the rule in *Hyman* v. *Hyman*.[5] It was a case of nudum pactum.]

Ross v. *Ross*,[6] in which *Hyman* v. *Hyman*[7] and *Gaisberg* v. *Storr*[8] were applied, is also relied upon as showing that a wife cannot contract out of her statutory right to claim maintenance in the High Court, and it is submitted, by analogy, that it was improper for the husband in the present case to purport to contract out of the statutory right given to him to apply to have the order for maintenance varied under section 7 of the Act of 1895. It is also submitted that, for the same reason, the present case is a parallel to *Hyman* v. *Hyman*,[9] save that public policy, which operated in that case in favour of the wife, should operate in the present case to prevent undue hardship to the husband.

Thirdly, *Ross* v. *Ross*[10] is relied on in support of the proposition that a wife cannot obtain a maintenance order in the High Court when she is already holding a maintenance order made by justices. *Bragg* v. *Bragg*,[11] *Kilford* v. *Kilford*[12] and *Abson* v. *Abson*[13] are all authority for the proposition that, where a wife, who has been a party to divorce proceedings, holds a justices' order for maintenance, that order remains effective until it is discharged, and the wife cannot obtain maintenance in the High Court and under the justices' order at the same time. The giving of an undertaking in the circumstances of the present case enabled the High Court to deal indirectly with matters of maintenance of which the justices were seized, thus usurping their jurisdiction. In the present case the justices have jurisdiction to consider the merits of the husband's situation. The fact that the husband is prohibited from applying to them to do so by the falling of a guillotine, as from the date of the undertaking, may result in certain injustice to the husband. An undertaking, given in such circumstances, is at the lowest undesirable and is, in fact, void.

---

[4] [1950] 1 K.B. 107; 65 T.L.R. 485; [1949] 2 All E.R. 411.

[5] [1929] A.C. 601.

[6] [1950] P. 160; 66 T.L.R. (Pt. 1) 755; [1950] 1 All E.R. 654.

[7] [1929] A.C. 601.

[8] [1950] 1 K.B. 107.

[9] [1929] A.C. 601.

[10] [1950] P. 160.

[11] [1925] P. 20; 41 T.L.R. 8.

[12] [1947] P. 100; 63 T.L.R. 436; [1947] 2 All E.R. 381.

[13] [1952] P. 55; [1952] 1 T.L.R. 379; [1952] 1 All E.R. 370.

C. A.
1956

RUSSELL
v.
RUSSELL.

John Wilmers for the respondent wife. The agreement in question is not one between the parties but an undertaking given to the court. Consideration is, therefore, not required. There is no authority limiting the kind of undertaking a court can accept, and it is very undesirable that there should be any limitation. Nor is there any authority or established practice as to the circumstances in which an undertaking should be given. It is always competent to a court to discharge an undertaking in its unfettered discretion. What it cannot do is to vary an undertaking: *Cutler* v. *Wandsworth Stadium Ltd.*[14] To say that the undertaking in the present case is not binding is a retraction on the husband's part against which, it is submitted, the court will lean.

It is not correct to say that persons cannot be excluded from their statutory rights as to maintenance by agreement: see *Mills* v. *Mills*,[15] which is authority for the proposition that an agreement between the parties that a wife's right to maintenance shall be discharged by a lump-sum payment is binding if a recital as to the payment of the sum is embodied in an order dismissing, by consent, the wife's application for maintenance. When such a transaction is carried through with the full knowledge of the court there is no impropriety. Even if the court were to receive from a wife, in whose favour a *Mills* v. *Mills*[15] order had been made, an undertaking not to make any future application for maintenance, it would be binding upon her because there would have been no attempt to remove the question of maintenance from the control of the court. For this reason the principles in *Hyman* v. *Hyman*[16] and *Bennett* v. *Bennett*[17] have no application to the facts under consideration. So far as those cases are invoked in support of the argument that the husband's undertaking was contrary to public policy, it is submitted that no question of public policy arises when a husband binds himself to pay maintenance.

It cannot be right to say that a High Court judge must put the matter of maintenance wholly to one side because an inferior court is seized of it. This is said to be the principle derived from *Kilford* v. *Kilford*[18] and *Ross* v. *Ross*.[19] In *Kilford* v. *Kilford*[20] no ruling was made; it was merely said that the practice of a High Court judge dealing with maintenance while an order of the magistrates' court was still in existence was undesirable.

---

[14] [1945] W.N. 40; 61 T.L.R. 273; [1945] 1 All E.R. 105.

[15] [1940] P. 124; 56 T.L.R. 561; [1940] 2 All E.R. 254.

[16] [1929] A.C. 601.

[17] [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413.

[18] [1947] P. 100.

[19] [1950] P. 160.

[20] [1947] P. 100.

Kilford v. *Kilford*[20] is, therefore, incorrectly cited in Rayden on Divorce[21] in support of the proposition that no order "will be "made" in the High Court while a justices' order remains in force. Barnard J., moreover, gave no reasons to support his view that the practice was undesirable, merely citing[22] the statement of Avory J. in *Rex* v. *Middlesex Justices, Ex parte Bond*[23] as to the inconvenience of concurrent jurisdiction. The latter case was concerned with an order for custody but was accepted by Sir Boyd Merriman P. (as he then was) as applying also to matters of maintenance in *Knott* v. *Knott*[24] and *Higgs* v. *Higgs*,[25] but it is to be noted that both those cases were decisions as to the jurisdiction of the justices when a petition is pending. No principle of law excluding the High Court from jurisdiction when the justices' court is seized of the question of maintenance has, in fact, been established. Such jurisdiction, indeed, may be useful and desirable.

Crawford replied.

JENKINS L.J. stated the facts substantially as set out above and, referring to the absence of evidence whether the woman the petitioner had married in March, 1953, was the one for whom he had left his wife, said that it did not greatly affect the case except that the fact that, at all material times, he had a woman to keep, whether his lawful wife or not, would tend to weaken any case he might seek to make in reliance upon his remarriage and the birth of the child as a change of circumstance rendering it difficult or impracticable for him to pay the maintenance to his first wife which he had undertaken to pay. His Lordship continued: I regard the history of these proceedings in relation to the undertaking as unfortunate, to say the least. No doubt both the commissioner and counsel for the petitioner were performing as well as they could the very difficult task of looking after the interests of a respondent wife who was not represented by counsel. No doubt it was thought that in the long run it might be the best for all parties that the marriage, which had obviously irretrievably broken down, should be put an end to. It was also desirable—indeed, essential—that proper provision should be made for the wife by the husband who, as clearly appeared from the evidence, was the party at fault. No doubt they were doing the best they could. At the same time, the stage in the proceedings at which the question of the undertaking was mooted and it was said that the petitioner was ready to give such an undertaking, was such as to suggest that the undertaking formed part of a bargain to the effect that, in consideration of the husband making satisfactory provision for the maintenance of the wife, the wife would amend her answer by a cross-prayer for divorce on her side. I am not suggesting that there was, in fact, anything actually improper in what was done. It was all done openly and in the face of the court; but, to my mind, it is much better to make sure that such matters should not savour of bargaining. The questions of maintenance should be reserved to be dealt with after the case has been heard out and not at a stage at which the position in regard to maintenance may influence one party or the other in the conduct of the proceedings. Proceedings such as these, of course, concern matters of status, and it is a truism to say that they should not be made the subject of any bargaining. Unfortunate as I think the course taken to have been, it was in these circumstances that the undertaking came into existence, and it seems to me reasonably plain that if counsel had not intimated the husband's willingness to give the undertaking, the matter might have taken a very different course. The wife might have adhered to her original intention not to ask for relief on her part, but to content herself by defeating the prayer in the petition, thus retaining her status as a wife and the rights of maintenance which belonged to her as a wife. It therefore seems difficult to resist the conclusion that the wife did irretrievably alter her position on the faith of this undertaking. That being so, I would for my part be reluctant in the extreme now to hold, at the instance of the husband, that the undertaking should be discharged, at the very time, as the commissioner pointed out, at which an event has happened of the kind against which the respondent may very well have been most anxious to guard, and against which the undertaking was very likely designed as a protection. Nevertheless, the matter has to be considered according to law, and if it is right in law that this undertaking should be discharged, then discharged it must be.

---

[20] [1947] P. 100.
[21] 6th ed., p. 548.
[22] [1947] P. 100, 102.
[23] [1933] 1 K.B. 72, 80.
[24] [1935] P. 158, 166–169.
[25] [1935] P. 28, 32.

Mr. Crawford, for the husband, attacked its validity on three grounds. First of all, he referred us to section 7 of the Summary Jurisdiction (Married Women) Act, 1895, which is the section giving jurisdiction to justices to vary or discharge orders for maintenance. It reads: "A court of summary jurisdiction . . . "may, on the application of the married woman or of her "husband, and upon cause being shown upon fresh evidence to "the satisfaction of the court at any time, alter, vary, or dis-"charge any such order,"—that is an order for maintenance—"and may upon any such application from time to time increase "or diminish the amount of any weekly payment ordered to be "made, so that the same do not in any case exceed the weekly "sum of £5." Mr. Crawford says that that section confers on the justices a discretionary jurisdiction to vary the amounts payable under maintenance orders made by them. He says that the justices had seisin of this matter (that is to say, the question as to the maintenance which should be paid by the husband to the wife) and that the discretion to vary the amount of those payments was theirs, and theirs alone. He says that the undertaking now in question should be held to be void as contrary to public policy because it purports to oust the jurisdiction of the justices. I cannot accept that argument. I find it impossible to hold that it is not open to a husband, against whom an order has been made by justices, to agree with his wife, for reasons that seem good to him and her, that he (the husband) will not apply to have the maintenance payable reduced below a specified sum. In my view, it would be remarkable if it was not possible for a husband to make a bargain of that sort with his wife. He is forgoing a right to apply for a reduction in his liability, and it does not seem to me that any question of public policy enters into the matter. Surely a husband could agree with his wife, to whom he was making payments by a justices' order, that he would not apply for a reduction in the payments below the amount at which they were currently payable unless his own income sank below the sum of £X a year. It seems to me it would be quite obvious that an agreement of that sort would not be void as contrary to public policy. If that is so, it seems to me to follow that an agreement embodying the terms of the present undertaking, which is an absolute undertaking not to apply for a reduction below the current amount except in the event of the husband being out of work and earning no money, would, so far as public policy was concerned, be unexceptionable.

I have so far referred to agreements out of court, that is to say, to agreements between husband and wife, depending merely upon contract. For my part, I see no reason for holding bargains such as I have described to be void as contrary to public policy. A fortiori it seems to me that a provision of that sort cannot be void on grounds of public policy if it is contained,

C. A.
1956

Russell
v.
Russell.

Jenkins L.J.

not in a mere agreement between the parties, but in an undertaking given to the court itself. An undertaking given to and accepted by the court must be taken to have been approved by the court. Furthermore, any undertaking given to the court is capable of being discharged by the court whenever it appears to the court that circumstances have arisen which make that course a proper one in the interests of justice. It could not, therefore, be said, where an undertaking to the court is concerned, that a husband by giving the undertaking has irretrievably deprived himself of any opportunity at any time of procuring a reduction in the amount of maintenance, however widely different his circumstances may become.

The next point taken by Mr. Crawford (which to some extent overlaps the first) is to the effect that this undertaking offends against the doctrine of *Hyman* v. *Hyman*.[1] That, of course, is the leading case, the case in the House of Lords, where it was held that a wife could not bind herself by agreement with her husband to forgo her right of applying to the court for maintenance in matrimonial proceedings between them. The principle has been shortly expressed by saying that a wife cannot contract herself out of her statutory right to maintenance. It is said that the same principle applies in a case like the present, where the wife has not bound herself by any agreement to forgo maintenance or to accept some fixed periodical sum once and for all as the maintenance payable to her. The effect of the undertaking here is not to curtail the wife's rights in the least degree. The effect of it is to assure that the husband undertakes that the wife shall receive by way of maintenance at least the sums now payable under the justices' order. It is argued by Mr. Crawford that what is sauce for the goose is sauce for the gander, and that if the wife cannot bind herself once and for all to accept maintenance at a specified rate, by parity of reasoning a husband cannot validly bind himself to his wife to pay her at least a certain fixed minimum sum by way of maintenance. It is said that precisely the same considerations apply to both sides of the bargain. I cannot agree. I think that the position of the husband in this matter is very different from that of the wife. It may be that in some circumstances the obligations undertaken by a husband in some form of agreement relating to maintenance in matrimonial proceedings might be so framed or attended with such consequences that it would be proper to hold them contrary to public policy. But, as a general proposition, I am by no means satisfied that the considerations applicable to a wife in this matter apply also to a husband. It is, however, unnecessary to express any concluded opinion upon that point, for, however the matter may stand as regards agreements out of court, this case is concerned, not with an agreement inter partes, but with an undertaking given to the court, and I am clearly of opinion that it is open to a husband to give an undertaking to the court such as the undertaking in the present case, and that there is no rule of public policy preventing him from doing so. The principle in *Hyman* v. *Hyman*,[2] be it remembered, is satisfied by any bargain which is brought before the court for approval and approved by the court. By parity of reasoning, it seems to me that that principle is satisfied where terms are embodied in an undertaking to the court, tendered to the court by the husband, and accepted by the court and incorporated in its order.

---

[1] [1929] A.C. 601; 45 T.L.R. 444.

Mr. Crawford's third point was that the effect of what took place in the divorce proceedings here was that the court arrogated to itself control over a matter of maintenance of which the justices were exclusively seised. He said that indirectly this court had usurped the jurisdiction of the justices by making it impossible for the husband to apply to them for an exercise of their discretionary jurisdiction. Again I cannot agree. The whole point of the course adopted in this case was that the amount of maintenance payable was left to rest upon the justices' order, provided that the weekly sum then payable under the order in respect of the wife was not to be reduced on the application of the husband and that the agreed increase of 10s. was obtained in the weekly sum payable in respect of the child. I wholly fail to see how any question of usurping the jurisdiction of the justices enters into that transaction at all. It seems to me that it was perfectly open to the court here, on being apprised of the fact that there was a justices' order on foot and on being apprised of the amount, to say that as there was an existing order, there was no need for the court to make any separate order of its own or, as would perhaps be strictly correct procedure, to leave it to the wife to apply to discharge the existing order and make an order of the High Court to take effect in substitution for the justices' order. It was unnecessary to complicate matters by taking that step, so long as the justices' order in respect of the wife was not reduced in amount. I see no reason why the court should not accept from the husband, if he was willing to give it, an undertaking that he would not apply for a reduction in the justices' order in respect of the wife unless he was out of work and not earning any money.

---

[2] [1929] A.C. 601.

The case has been very well argued, and we were referred to a number of authorities. I hope I will not be thought disrespectful to the arguments of counsel if I do not go through them all. We were invited to hold that the decisions in *Kilford* v. *Kilford* [3] and *Ross* v. *Ross* [4] were open to criticism in what was said about the relationship between justices' orders and orders for maintenance in the High Court. It appears to have been regarded as settled for more than 30 years—we were referred to *Bragg* v. *Bragg* [5]—that where a justices' order for maintenance has been made and divorce supervenes, the justices' order remains in force until it is discharged. It was held in *Kilford* v. *Kilford*,[6] as I understand the position, that an order could not properly be made in the divorce court while a justices' order was still on foot, and that the proper course was to apply to discharge the justices' order before making any application for maintenance in the High Court; and that view was followed in *Ross* v. *Ross*.[7] I think that these cases are directed merely to the proper practice to be followed and the most convenient course to be taken in cases where there are divorce proceedings after the justices have made an order for maintenance. We were referred to no statutory provision and to no authority to suggest that as a matter of law, as distinct from a matter of practice and of convenience, it would be wrong in all circumstances for the divorce court to entertain an application for maintenance without first requiring the discharge of a justices' order. Generally speaking, that would be by no means a convenient course, and I think that the two cases, to which I have referred, correctly state the course which ought to be taken in all usual circumstances; but exceptional cases may arise, and I only wish to say that, in my view, in an exceptional case there would be no objection, as a matter of law, to the court supplementing the justices' order by an order of its own.

I hope that I have sufficiently referred now to the essential features in the argument presented, and I agree with Mr. Wilmers that, this being an undertaking given to the court and not merely an agreement inter partes, it was not necessary that there should be any consideration to make it binding. I also agree with him that it is always competent to the court to discharge an undertaking given to it, if in its discretion the court comes to the conclusion that that is the proper course in the interests of justice. But, as to the present case, while the principle to which I have just referred undoubtedly applies, so that the court would in a proper case discharge the undertaking given, there is no question, in my view, of the undertaking not being a perfectly valid undertaking, and it is plain from the evidence that the petitioner has wholly failed to show any such change in circumstances as would warrant the court in discharging the undertaking. I think, in order to obtain a discharge of the undertaking, he would have to show a real case of hardship, some essential change in his circumstances, beyond the mere fact of his remarriage and the birth of a child; for, after all, he did voluntarily give this undertaking to the court when it suited him to do so. If he could make out a sufficiently strong case, it would be open to him to apply, and it would be open to the court, if satisfied with the case he made out, to discharge the undertaking. As matters stand at present, he has, in my judgment, wholly failed to make out a case. Accordingly, I think the commissioner arrived at a right conclusion, and I would dismiss this appeal.

---

[3] [1947] P. 100; 63 T.L.R. 436; [1947] 2 All E.R. 381.

[4] [1950] P. 160; 66 T.L.R. (Pt. 1) 755; [1950] 1 All E.R. 654.

[5] [1925] P. 20; 41 T.L.R. 8.

[6] [1947] P. 100.

[7] [1950] P. 160.

Birkett L.J. I am entirely of the same opinion; and, as my Lord's judgment has covered so fully the facts of the case and also the points of law which have been raised by counsel, there is very little that I need add.

I am glad that we are able to come to this conclusion, because it seems to me that, upon a consideration of all the facts, to decide otherwise would be to perpetrate an injustice. It is plain to me that from the beginning in the proceedings before the commissioner the question of maintenance was a very prominent topic. Indeed, it says a good deal for counsel for the husband before the commissioner that he was concerned about this topic for the woman against whom he was appearing, because she was without legal aid and, in accordance with the best traditions of the Bar, he was most anxious that she should not suffer. When the situation was appreciated by the commissioner, it was really at his suggestion that the discussion took place between the respondent and counsel for the husband about this matter of maintenance, because the wife's position, I think, was plain: "The marriage, so far as I am concerned, is over, without hope "of it being restored, but all I am concerned about is that I "should have means whereby I shall be kept. If I do not allow "this marriage to be dissolved, I will be a wife and there will be "the duty upon my husband to maintain me; but, if I am "divorced, and allow myself to be divorced, then I may be in a "very much worse position." It was upon being assured, as I think, that she would not be in any worse position that the hearing took the form it did; and I share the view my Lord has expressed that it was unfortunate that the proceedings should go in that way, though I am quite satisfied, as my Lord said, that everybody was really determined, in the circumstances, to see that the woman who had no counsel was adequately protected.

So far as the written decision of the commissioner is concerned, I think there is a very reasonable ground for saying, when he says "I see no ground to discharge that undertaking," that he, after all, was the commissioner who conducted the original proceedings where the undertaking was given, he knew what the facts of the case were, and it may very well be that he was saying: "In those circumstances, I "would want a great deal to make me discharge this under"taking which was voluntarily given and upon which this good "lady altered her position as she did, to the knowledge of "everybody"; but I think also that it might reasonably be said that what he was saying was this: "The material which has "been put before me to invite me to discharge this order is by "no means of the texture or quality which would make me "do it," and I think that when he said "I see no reason to "discharge this order, nor indeed to vary it, if I had the power, "which I have not," it shows that he was considering the nature of the application and the nature of the evidence which had been presented to him. If that was the decision which he came to, "The material here is not strong enough to allow me "to discharge it," I should myself find no fault with his decision upon that ground.

In view of what my Lord has said about the legal matters, I can confine myself to a sentence or two. I entirely agree with his view about the assistance we have had from counsel on both sides. This was, at any rate in my experience, rather a new point, and there was no real authority to cover it, but I can see no reason in law or in common sense why a husband should not make an agreement with his wife to pay certain agreed sums, and certainly, to be more specific, I see no reason why he should not even be able to agree and say: "I will undertake with you "not to make any application to vary this order or this sum "below an agreed minimum." Secondly, I do not think that the principle of *Hyman* v. *Hyman*[8] which was invoked has got any application to this case. There are two passages in which Lord Atkin, I think, puts the pith of the whole matter[9]: "When the "marriage is dissolved the duty to maintain arising out of the "marriage tie disappears. In the absence of any statutory enact-"ment the former wife would be left without any provision for her "maintenance other than recourse to the poor law authorities. In "my opinion the statutory powers of the court to which I have "referred were granted partly in the public interest to provide "a substitute for this husband's duty of maintenance and to "prevent the wife from being thrown upon the public for support. "If this be true, the powers of the court in this respect cannot "be restricted by the private agreement of the parties"; and then a little lower down[10]: "In my view no agreement between "the spouses can prevent the court from considering the question "whether in the circumstances of the particular case it shall "think fit to order the husband to make some reasonable pay-"ment to the wife, 'having regard to her fortune, if any, to the "'ability of her husband and to the conduct of the parties.' "The wife's right to future maintenance is a matter of public "concern, which she cannot barter away." That is the principle, as I understand it, of *Hyman* v. *Hyman*,[11] but, on the facts of the present case, where a husband has given a voluntary undertaking to the court not to make any application to reduce the amount he has agreed to pay, I cannot think that the principles of high public policy which were enunciated in *Hyman* v. *Hyman*[11] have got any application.

I think, finally, that the argument that was addressed to us, that here there was an attempt by the High Court to usurp the powers of the justices and to make concurrent jurisdiction, has got no basis in it whatever. I think the situation which I put during the argument is right, that here, where maintenance was prominent in the minds of everybody from the start, where everybody was concerned to see that the woman without counsel suffered no injury and no wrong in the matter of maintenance, when she altered her position on being assured that there was no danger as to maintenance, then what the commissioner was really doing was to say: "That order of the justices being in force, that "undertaking having been given to the court, let there be no

---

[8] [1929] A.C. 601.
[9] Ibid. 628.
[10] Ibid. 629.
[11] [1929] A.C. 601.

"attempt to reduce it. There is no necessity for this court to "make a nominal order or any order, or to suggest that the "justices' order should be discharged before an order is made," and in fact the commissioner did nothing. Seeing that the maintenance matter was, in his view, in a satisfactory position, he did nothing; and I cannot think that that point that Mr. Crawford made has got any validity. It is quite clear, I think, that the petitioner had the power to give this undertaking to the court, which differentiates it from the ordinary case of an agreement. The court accepted it, made it a part of the order, had it filed in the court; but the suggestion that it is there for all time is not, I think, well founded, because I can conceive circumstances in which a commissioner or a judge may say "At the "moment I see no ground for discharging this order," and later, when there was a real change of circumstances which did so merit a discharge of the order, that he could then say "Now I "think there are grounds on which this order may be "discharged."

For these reasons, I would agree with the judgment of my Lord and the reasoning which governed that judgment, and with the commissioner's decision, and I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Watkins, Pulleyn & Ellison for Hepherd, Winstanley & Pugh, Southampton; Jaques & Co. for John W. Richardson, Christchurch, Hants.*

E. J.

C. A.

1956
March 26.

Jenkins and Hodson L.JJ.

WALLER *v.* WALLER.

Husband and Wife — Alimony pendente lite — Adultery admitted by wife — Condonation and conduct conducing alleged and denied — Jurisdiction of court to award alimony—Matters to be taken into account—Judicial separation—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 20 (1).

By section 20 (1) of the Matrimonial Causes Act, 1950: "On "any petition for judicial separation, the court may make such "interim orders for the payment of alimony to the wife as the "court thinks just."

A wife, on petitioning for a decree of judicial separation, admitted certain acts of adultery, but alleged that there had been conduct conducing and condonation, which the husband denied. On an application by the wife for alimony pendente lite:—

Held, that under the terms of the subsection the court had an unfettered discretion to deal with an application as it thought just. All relevant matters, such as adultery, conduct conducing and condonation, were to be taken into consideration, but it was impossible to lay down a hard-and-fast rule that in all circumstances adultery by a wife barred her claim. It did not appear from the authorities that a guilty wife who could not plead conduct conducing or condonation was barred from relief.

Per curiam. Inasmuch as the discretion of the court can be exercised in favour of a wife who has committed adultery, it may be that in some cases even a wife who did not plead conduct conducing or condonation might, in appropriate circumstances, be granted alimony pendente lite; for she would be a competent suitor.

Welton v. *Welton* [1927] P. 162; 43 T.L.R. 174 applied.

Decision of Barnard J. affirmed.

APPEAL from Barnard J.

A wife presented a petition for judicial separation on the ground of cruelty; with the petition she filed a discretion statement in which she admitted certain acts of adultery.

On an application by the wife for alimony pendente lite, affidavits were filed in which the wife admitted acts of adultery, but alleged conduct conducing and condonation on the part of the husband, which the husband denied. Barnard J. made an order as prayed. The husband appealed.

Frank Whitworth for the husband. A wife who has confessed to acts of adultery is not normally to be awarded alimony pendente lite; but this general rule of practice may be departed from in certain circumstances, as when there has been condonation or conduct conducing: *Welton* v. *Welton*.[1] It is not sufficient for the husband merely to allege acts of adultery; there must be proof, and in the present case there is a confession. Similarly, it is not sufficient for the wife merely to allege condonation or conduct conducing; they must be proved, and in the present case they are denied. When a wife has admitted adultery the burden of proof is on her to establish her right to alimony pendente lite. The judge based his discretion on mere allegations by the wife; the court will not treat mere allegations as proof, and there is always a presumption against condonation. [*Bullock* v. *Bullock*,[2]

---

[1] [1927] P. 162; 43 T.L.R. 174.

[2] [1942] P. 134; 58 T.L.R. 333; [1942] 2 All E.R. 259.

Wells v. *Wells*,[3] *Tilley* v. *Tilley*[4] and *Stevenson* v. *Stevenson*[5] were referred to.]

In the present case there is on the one hand an admission of adultery by the wife; that, without more, disentitles her to alimony, and she cannot get rid of that disqualification by mere assertions which the husband denies. The fact that she is a "competent suitor," to the extent that her petition could not be struck off the file, does not affect the way in which the court's discretion should be exercised in such a case as this.

John Stephenson for the wife. Section 20 (1) of the Matrimonial Causes Act, 1950, gives the court the widest and most unqualified discretion in dealing with applications of this kind. It is wider in terms than section 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, under which *Welton* v. *Welton*,[6] a case which is strongly in favour of the present wife, was decided. Since the Matrimonial Causes Act, 1937, a wife petitioning for judicial separation is in the same position as regards alimony as a wife petitioning for divorce. The court has the widest discretion in the matter, and there is no ground for overruling the exercise of his discretion made by the judge below.

JENKINS L.J. In this case the wife, respondent in the present appeal, on May 5, 1955, presented a petition praying for a decree of judicial separation from the husband on the ground of his cruelty. The wife filed a discretion statement admitting certain acts of adultery by her in respect of which she sought the discretion of the court. There have been no pleadings subsequent to the petition, but various affidavits have been filed, some of them directed to questions as to the husband's domicile, with which we are not now concerned. The upshot of the affidavit evidence is that the wife admittedly committed adultery on a number of occasions. She admitted as much in her own affidavit evidence, and there were also admissions of adultery by her, or passages which could be construed as such admissions, in a diary of hers put in evidence by the husband. She met these charges by alleging that the husband by the cruel conduct complained of in the petition had conduced to her adultery, and further, she alleged that her adultery had been condoned. The matter, therefore, stands thus: the wife is claiming judicial separation. That claim has been countered by allegations of the wife's adultery. The wife, on the other hand, has said that the adultery was conduced to by the husband's cruel conduct and/or was condoned by him.

---

[3] [1954] 1 W.L.R. 1390; [1954] 3 All E.R. 491.

[4] [1949] P. 240; 65 T.L.R. 211; [1948] 2 All E.R. 1113.

[5] [1944] P. 52; 60 T.L.R. 267; sub nom. *S.* (*otherwise B.*) v. *S.* [1944] 1 All E.R. 439.

[6] [1927] P. 162.

In due course the wife applied for alimony pendente lite. That application was resisted by Mr. Whitworth, on behalf of the husband, on grounds to which I will shortly refer. The judge rejected those grounds and made the order which is the subject of the present appeal.

The grounds relied on in opposition to the application for alimony pendente lite appear from this question posed by Mr. Whitworth at the opening of his argument. He stated the question as being whether a wife who has admittedly committed adultery, and therefore normally would not be entitled to alimony pending suit, can get alimony on a statement, which the husband denies, that the admitted adultery has been condoned.

That question was, in effect, answered adversely to the husband by the order under appeal, and the form of that order is accounted for, I think, by the course the matter took before the registrar and before the judge, as explained to us by counsel. The form of the order made was this: the judge decided that the fact that the petitioner had committed adultery did not in the circumstances of this case preclude her from obtaining alimony pending suit, and referred the petitioner's application back to the registrar as to quantum, and gave leave to appeal.

Consideration of the matter is best begun by a reference to the jurisdiction to award alimony pendente lite on a petition for judicial separation conferred by section 20 (1) of the Matrimonial Causes Act, 1950, which is in these terms: "On any petition for "judicial separation, the court may make such interim orders for "the payment of alimony to the wife as the court thinks just."

It is material, I think, to compare that provision with the corresponding provision regarding alimony pendente lite in the case of a petition for divorce or for nullity of marriage. That comes in subsection (1) of section 19, and, mutatis mutandis, is in exactly the same terms: "On any petition for divorce or "nullity of marriage, the court may make such interim orders for "the payment of alimony to the wife as the court thinks just."

It will be seen, therefore, that, so far as the statute is concerned, the amplest discretion, as the law now stands, is conferred on the court in the matter of alimony pendente lite whether the case be one of a petition for judicial separation or one of a petition for divorce or nullity of marriage. Nevertheless, Mr. Whitworth has submitted that in a case of this kind the court is bound by a hard-and-fast rule which he was inclined, I think, to describe as a rule of practice rather than a rule of law, that once a wife has admitted adultery in the course of matrimonial proceedings she is precluded from an award of alimony pendente lite. He admits that an allegation by the husband of adultery by the wife would be no bar for this purpose, but he says that, if there is an admission of adultery by the wife, that is a bar and, as I understand his argument, that admission remains a bar even though the wife is seeking the discretion of the court, and is still a bar even though the wife alleges on oath conduct which she proposes to prove conducing to the adultery, or alleges on oath and proposes to prove condonation of the adultery.

Mr. Whitworth referred us to a number of cases dealing with this question, and he invited us to hold that upon these authorities his argument was well founded. He based himself to some extent on a submission as to the onus of proof: he said that once adultery is admitted, it is for the wife to displace its effect by some more cogent evidence than her own word on affidavit.

In my view the authorities disclose no warrant for limiting the discretion of the court in this way. The matter is one for the court to deal with as it thinks just in its unfettered discretion. If it appears at the time of an application for alimony pendente lite that the wife has committed adultery, that is no doubt a matter, and a very serious matter, to be taken into account. If in such a case the wife has admitted adultery but questions of conduct conducing to the adultery or condonation of the adultery are put in issue, then it seems to me that there cannot be any justification for the view that although these matters are put in issue and although the wife, notwithstanding the admitted adultery, may nevertheless succeed in her petition, yet she must necessarily be held disqualified from claiming alimony pendente lite.

The first of the cases to which Mr. Whitworth referred us was the decision of the Court of Appeal in *Welton* v. *Welton*.[1] That was the case of an application brought under subsection (3) of section 190 of the Judicature Act, 1925, which provided that: "On any petition for divorce or nullity of marriage the court "shall have the same power to make interim orders for the pay-"ment of money by way of alimony or otherwise to the wife as "the court has in proceedings for judicial separation." The leading argument on behalf of the husband, as I understand the case, was to the effect that the form of section 190 in conjunction

---

[1] [1927] P. 162; 43 T.L.R. 174.

C. A.

1956

WALLER
v.
WALLER.

Jenkins L.J.

with other provisions which I need not trace out was such as to bring into applications for alimony on petitions for divorce or nullity of marriage the principles which the Ecclesiastical Court would apply in a like application on a petition for separation, the rule of the Ecclesiastical Court being, it would seem, uncompromisingly to the effect that adultery by the person seeking relief constituted an absolute bar to relief; and it was argued that this strict rule was imported into the jurisdiction conferred by subsection (3) of section 190. That argument was rejected by Lord Merrivale P., and his decision was affirmed by the Court of Appeal in language which, to my mind, makes it reasonably plain that the view which Mr. Whitworth has invited us to take of the court's jurisdiction in this matter cannot be supported. I should, I think, read part of the President's judgment and also some passages from the judgments of the Court of Appeal. Lord Merrivale P. said this[2]: "The ground of the respondent's appeal against the "order for alimony pendente lite is that in a previous suit wherein "he was petitioner for dissolution of marriage the now petitioner "was found guilty of adultery. Counsel on his behalf contended "that there is no jurisdiction in the court to allot alimony pen-"dente lite to a wife so found guilty or to a wife shown to be "guilty by her own confession. This proposition is founded on "authorities in divorce, such as *Holt* v. *Holt and Fleeming*[3]; "*Whitmore* v. *Whitmore*,[4] and numerous decisions under the "common law which lay down that a wife, living apart from her "husband and guilty of adultery, may not pledge her husband's "credit for necessaries, and that in the case of such a wife certain "statutory liabilities of a husband in respect of maintenance "cannot be enforced." Then he went on to say that *Holt* v. *Holt and Fleeming*[3] and *Whitmore* v. *Whitmore*[4] were simple cases. "In the former alimony pendente lite was refused in a "suit for divorce upon proof that in an Ecclesiastical Court the "respondent had already been found guilty of adultery. In the "latter, upon a wife's confession of adultery in the course of "the proceedings on a petition for divorce, an order for alimony "pendente lite which was then subsisting was, as from the date "of the confession, discharged. In like cases the same course "would probably be taken to-day.

"The present case is complicated, however, by the fact that "the decree of the court in the husband's suit, which pronounced "the guilt of the wife, found the husband guilty of conduct

---

[2] [1927] P. 162, 167.

[3] (1858) 28 L.J.P. & M. 12.

[4] (1866) L.R. 1 P. & M. 96.

"conducing to the wife's adultery, and therefore dismissed his "petition. This state of facts was said by the wife's counsel to "bring the case within the principle laid down in *Wilson* v. "*Glossop*,[5] that a husband who connives at adultery on the part "of his wife remains under the same liability for the wife's "maintenance as though she had remained chaste."

Then comes this important passage[6]: "The wife in this "present suit is a competent suitor, in that she sues for relief "which the court is able, upon proper proof, to afford to her. "Moreover, the husband is not free of complicity in the misconduct on her part, as has been established in his suit by "the decree of the court. Whether after such misconduct the "wife could pledge the husband's credit for necessaries is not "the question. The decisive inquiry, in my view of the matter, "is whether the wife, on the facts before the court, is a competent "suitor for relief in a matrimonial cause. She undoubtedly is. "Thereupon the jurisdiction of the court to order alimony "pendente lite appears to me to arise. It is that jurisdiction "which has been exercised in the Registry.

"Conditions are easily conceivable in which, although this "jurisdiction exists, no order could properly be made. A wife "who has brought cohabitation to an end by admitted misconduct "for which the husband was not to blame, or a wife who, in some "independent situation, is seeking divorce, and cannot be granted "relief except under the discretionary power of the court, may "very likely not be a proper applicant for an allotment of alimony "pendente lite. That will depend upon consideration of the "relevant facts."

Lord Hanworth said this[7]: "It is said on the authority of "*Otway* v. *Otway*[8] and other cases, such as *Everett* v. *Everett*,[9] "that a judicial separation can only be granted where the petitioner comes to the court with a pure character and is free from "all matrimonial misconduct. It is argued that the present "petitioner comes before this court with a decision given by "Lord Coleridge J. that she has been guilty of adultery, that the "police magistrate revoked the order for payment of maintenance "because she had been found guilty of adultery, and that therefore, if her position is to be tested by whether she would be "able to get a judicial separation, she, upon proof of the decision

---

[5] (1887) 19 Q.B.D. 379; 20 Q.B.D. 354; 4 T.L.R. 239.

[6] [1927] P. 162, 169.

[7] Ibid. 175.

[8] (1888) 13 P.D. 141; 4 T.L.R. 523.

[9] [1919] P. 298.

"of the High Court, would fail, because it has been established "against her that she is not of pure character, but has been "guilty of adultery. Those two cases are cases in which adultery "was considered simpliciter without any question of disability "arising on the part of the other spouse to rely upon it by reason "of his conduct conducing, and may be dealt with, to use a not "inconvenient phrase, as cases of adultery simpliciter. I desire, "however, to observe that in *Everett* v. *Everett*[10] it is clear that "the ground on which the court refused to act in favour of the "petitioner was that when he came before the court he was compelled to admit that at the time the petition was launched and "at the moment when the action of the court was invited he was "still living in adultery. Those two cases appear to deal with "the position and rights of persons in reference to a final decree. "They do not deal with the position of persons who are applying "for an interim order in the course of the conduct of the case "pendente lite."

Then Lord Hanworth said[11]: "The learned President pointed "out that the wife was a competent suitor. What may be the "ultimate fate of her petition we do not know, but it cannot be "said that her petition could be ordered to be withdrawn from "the file on the ground that she was incapable of presenting it "by reason of the fact that she has been guilty of adultery; and "inasmuch as she may say against her husband that the adultery "was due to his conduct conducing, he cannot rely upon it as "definitely preventing her from taking proceedings."

Sargant L.J. said[12]: "The argument is this, that if the suit "had been one for judicial separation the wife would necessarily "have been barred both from ultimate relief and from an interim "order for alimony by the fact of her adultery, and that therefore "that must be so even in this suit, which is a suit for divorce "or nullity. It appears to me that that argument is quite ill-"founded, because the class of cases in which a wife may get "relief by way of decree for dissolution or nullity is more extensive than the class of cases in which the wife may get a judicial "separation. By the language of the subsection in question the "power to grant alimony is a general power in suits for divorce "or nullity and not merely in suits for divorce or nullity of the "same character as, or brought in circumstances similar to suits "for judicial separation."

[10] [1919] P. 298.

[11] [1927] P. 162, 177.

[12] Ibid. 179.

Then Sargant L.J. went on to consider section 190 of the Judicature Act, and continued [13]: "In the present case, as the "learned President has said, the wife has a prima facie right to "bring this suit. Her petition is a maintainable petition. It is "not on the face of it bad. Although she may have committed "adultery, nevertheless her conduct may be excused under the "relevant sections of the Act, and she may therefore succeed in "getting a divorce from her husband. That being so, there is "no reason for saying that the power of the court under sub-"section (3) to grant interim alimony is limited or is negatived "by the fact of her having committed adultery."

We were also referred to *Bullock* v. *Bullock*.[14] In that case "the wife had written a letter which, taking the words used in "their ordinary meaning, was a confession of adultery"; but then, at a later stage in the proceedings, she denied by affidavit that she had committed adultery. The question was whether, in that state of the case, an order for alimony pendente lite ought to be made. It came before Langton J. I think I need only refer to the passage [15] where, after saying "There are certain "other circumstances in this case which I think should be taken "into account," and referring to a suggestion that the parties were living apart "upon a kind of agreement," he continued: "I think that is a circumstance which has to be borne in mind. "It should be remembered that if the husband, for example, had "been guilty of conduct conducing—I agree there is no such plea "at present on the file—there would have been no bar to her "claim for alimony pendente lite in the fact that the woman had "admitted adultery. There is the other alternative that the "letter is mere romance, that it has no substratum of truth at "all, and that the affidavit is to be preferred.

"In *Welton* v. *Welton* [16] the President, Lord Merrivale, "thought that there was a fit case in which to award the wife "alimony pendente lite because of the whole of the circumstances "of the case; and he was upheld in his decision by the Court of "Appeal. The case is very clear authority for the proposition "that the mere fact that the woman has admitted adultery, "important as it may be, is not always a bar to an application "of this class."

---

[13] [1927] P. 162, 180.

[14] [1942] P. 134; 58 T.L.R. 333; [1942] 2 All E.R. 259.

[15] [1942] P. 134, 135.

[16] [1927] P. 162.

We were referred also to *Stevenson* v. *Stevenson*.[17] The headnote of that case is this: "An order for alimony pendente "lite made in nullity proceedings in favour of a wife against whom "a decree nisi is made on the ground of her wilful refusal to "consummate the marriage does not cease to have effect when "the decree nisi is pronounced, but continues until the marriage "has been annulled by the decree absolute or until the order is "discharged or varied by a further order of the court." It was there altogether a different case, but there was some comparison of the position in the case of wilful refusal to consummate and in the case of adultery being proved against a wife in the bearing of such findings on the question of alimony, and Bucknill J. said this[18]: "However, when a wife is found guilty of adultery "without any extenuating circumstances, the practice is that "alimony pendente lite automatically ceases unless the court "otherwise orders. Such a practice was approved by the Court "of Appeal in *Dunn* v. *Dunn*.[19] In that case Cotton L.J. said: "'Until adultery has been proved against the wife she is entitled "'to support and the court gives her alimony pendente lite. "'But when her adultery has been proved, though she is still "'a wife she has lost that right.'" He went on to quote from the judgment of Lindley L.J. in the same case, where he cited Lord Penzance in *Wells* v. *Wells*[20] as having admitted the principle that where the wife is satisfactorily proved to have been guilty of adultery alimony ceases.

I think it is enough to say of that case that it deals with the position at the time of decree, and not the position, in cases such as the present, where the matter comes before the court on an application for alimony pendente lite. I think it is quite plain from the case of *Welton* v. *Welton*[21] that so far as applications pendente lite are concerned, it is not right to say that once there is adultery, the claim to alimony pendente lite necessarily and in every case and in all circumstances ceases.

We were referred to other cases which I do not find it necessary to discuss. The conclusion of the whole matter seems to me to be that on an application for alimony pendente lite the court should have before it and take into consideration all relevant matters. Amongst other relevant matters would be the conduct of the parties, and in particular one most important matter would be any adultery shown to have been committed by the wife. As against that relevant matter there might be other relevant matters such as the presence on the file of a plea of conduct conducing or condonation, either in the pleadings themselves or in affidavits on the interlocutory application. These are all relevant circumstances to be taken into account, and it seems to me wholly impossible for the court to lay down any hard and fast rule, whether it be called a rule of law or a rule of practice, to the effect that in all circumstances adultery by a wife bars her claim. I think that inasmuch as the discretion of the court can be exercised in favour of a wife who has committed adultery, it may be that in some cases even adultery not claimed to have been condoned and not claimed to have been brought about by conduct conducing on the husband's part, might yet, in appropriate circumstances, be held not to be a bar; for a wife in such a case, notwithstanding the adultery in respect of which she was seeking discretion, would be, as Lord Merrivale put it in *Welton* v. *Welton*,[22] a competent suitor, and if she is a competent suitor, it must not be judged against her at an interlocutory stage that she will necessarily fail in the proceedings.

---

[17] [1944] P. 52; 60 T.L.R. 267; sub nom. *S.* (*otherwise B.*) v. *S.* [1944] 1 All E.R. 439.

[18] [1944] P. 53.

[19] (1888) 13 P.D. 91, 93; 4 T.L.R. 399.

[20] (1864) 3 Sw. & Tr. 542, 545.

[21] [1927] P. 162.

Accordingly, in my view this appeal fails and should be dismissed.

HODSON L.J. I agree. The argument on behalf of the husband has really been based upon the common law principle that the wife, having committed adultery, is not entitled to pledge her husband's credit for necessaries, and therefore, it is argued that she ought not to be entitled to alimony pendente lite. That argument, to my mind, is fallacious. As was shown by the judgment of Lord Merrivale in *Welton* v. *Welton*[23] and by the judgment of the Court of Appeal in the same case, the jurisdiction to grant alimony pendente lite depends upon statutory provisions. The relevant statutory provision today is section 20 (1) of the Matrimonial Causes Act of 1950, in so far as proceedings for judicial separation are concerned. That provides: "On any petition for judicial separation, the court may make "such interim orders for the payment of alimony to the wife as "the court thinks just." The power of the court is entirely at large and is not limited in any way as to power by the fact that the wife has committed adultery.

---

[22] [1927] P. 162, 169.

[23] [1927] P. 162.

I thought that this question had really for ever been laid at rest by the decision of this court in *Welton's* case.[24] Lord Merrivale, at first instance, seemed to me to explain the matter very fully when he said[25]: "The decisive inquiry, in my view "of the matter, is whether the wife, on the facts before the "court, is a competent suitor for relief in a matrimonial cause. "She undoubtedly is. Thereupon the jurisdiction of the court "to order alimony pendente lite appears to me to arise. It is "that jurisdiction which has been exercised in the Registry. "Conditions are easily conceivable in which, although this juris"diction exists, no order could properly be made. A wife who "has brought cohabitation to an end by admitted misconduct "for which the husband was not to blame, or a wife who, in "some independent situation, is seeking divorce, and cannot be "granted relief except under the discretionary power of the court, "may very likely not be a proper applicant for an allotment of "alimony pendente lite. That will depend upon consideration of "the relevant facts."

Pausing there for a moment, the relevant facts have not yet been fully considered in this case. Lord Merrivale no doubt had in mind, on the one hand, the extreme case of the wife who is petitioning for divorce and asking for discretion to be exercised in her favour while living with and being supported by her paramour. Such a wife would not expect to succeed in an application for alimony pendente lite. At the other end of the scale, the wife may have committed a single act of adultery and in due course the discretion of the court might be exercised in her favour and she might obtain a decree. At the end of the passage which I have been reading, Lord Merrivale used these words[26]: "In dealing with these"—that is, the relevant facts—"regard must be had not only to the decisions in cases like *Holt* "v. *Holt*[27] and *Whitmore* v. *Whitmore*,[28] but to the state of "the existing law of divorce, under which the court has the "responsibility of deciding, not only as to innocent wives but as "to guilty wives, whether provision of some sort should be made "for the wife by the husband." It follows, therefore, I think, that the guilty wife is not ipso facto disentitled to alimony pendente lite, any more than she is disentitled to apply for maintenance after divorce, because, after all, even if she succeeds in obtaining a decree of divorce in her favour in the discretion of the court, she is still a guilty wife. The authorities on this matter do not in any way, in my view, limit the case of the guilty wife who is entitled to apply for alimony pendente lite to the guilty wife who can excuse her guilt either by alleging condonation or connivance or conduct conducing. Nothing can be said to restrict the ambit of the statute, which is quite general in its terms.

---

[24] [1927] P. 162.
[25] Ibid. 169.
[26] Ibid. 170.
[27] 28 L.J.P. & M. 12.
[28] L.R. 1 P. & M. 96.

In my judgment, therefore, this appeal must be dismissed.

Something has been said about the form of the order which the judge made, which might, on one reading of it, I should have thought, appear to limit the jurisdiction of the registrar in considering the quantum of alimony; but I think that the order ought not to be so read, and that when the matter goes before the registrar for consideration as to the amount, if any, which this man is to pay to this woman, he is not to be precluded from considering the conduct of the wife in addition to the means of the parties. I do not think, therefore, that the judge must be taken to have assessed the conduct of the wife as disclosed in the affidavits which were used before him as conclusive one way or the other as showing whether or not the amount of alimony ought to be influenced by what is apparently here the admitted fact that the wife has committed adultery.

JENKINS L.J. I agree with what has fallen from my brother Hodson as to the form of the order in this case, which should remain undisturbed; and in the result the order made will be that the appeal be dismissed.

Appeal dismissed.

Solicitors: *Rowe & Maw; Glover & Co.*

F. R. D.

BEIGAN *v.* BEIGAN.

[1955 D. No. 49.]

C. A.

1956
May 29, 30.

Denning, Birkett and Parker L.JJ.

Husband and Wife—Desertion—Termination—Adultery—Condonation—Husband's threat to leave home countered by wife's warning that if he goes he cannot come back—Husband's act in leaving home desertion reviving condoned adultery for all purposes—Change of locks by wife—No acceptable offer of cohabitation by husband—Wife not in desertion.

A husband, who had committed adultery, but whose wife had condoned it, left the matrimonial home in the middle of the night after exchanging angry words with his wife. Before he left, she said: "If you go now you do not come back again"; but he went. He returned to the home the next day or a day or two later. The locks on the doors had been changed, and the wife refused to take him back. On the wife's petition for a decree of divorce on the grounds of adultery and desertion, and the husband's answer praying for divorce on the ground of her desertion of him, the commissioner granted the wife a decree nisi on both her grounds and refused the husband's prayer in his answer, finding that there never was an offer by the husband to return which it was incumbent on the wife to accept. On appeal by the husband:—

Held, (1) that the wife's warning words did not prevent the husband's act in leaving home, albeit for a few hours only, from being an act of desertion which revived the condoned adultery for all purposes; and that the wife was accordingly entitled to a decree on the ground of adultery simpliciter.

Bevan v. *Bevan* (*No.* 2) [1955] 1 W.L.R. 1142; [1955] 3 All E.R. 332 approved.

Barnett v. *Barnett* [1955] P. 21; [1954] 3 All E.R. 689 and *Fishburn* v. *Fishburn* [1955] P. 29; [1955] 1 All E.R. 230 questioned and distinguished.

(2) That as there was no genuine offer by the husband to resume cohabitation which it was incumbent on the wife to accept, the wife, despite her locking of the doors, was not in desertion of him.

Per Denning L.J. If a wife locks the door against her husband, it does not automatically terminate his desertion. It depends on whether it has any effect on him by preventing him from seeking a reconciliation. English law, unlike Scots law, does not require a petitioner to prove that she was throughout the statutory period of desertion "willing to adhere" to her husband.

APPEAL from Judge Rewcastle, sitting as Commissioner in Divorce at the Liverpool Autumn Assizes.

The parties, James Ernest Beigan and Ethel May Beigan, were married in 1931, and there were three children, born in 1931, 1935 and 1940. In 1945 the husband committed adultery with a married woman, as a result of which a child was born to that woman. His wife condoned the adultery and took the husband back. On some occasions thereafter he asked his wife to take charge of the child born of the adulterous association, but she refused; and the marriage continued, though not very happily. On various occasions the husband threatened to leave, and indeed packed his bags. One evening in October, 1951, when the wife was out visiting a woman friend, the husband, who had become suspicious that his wife was meeting another man and had objected to her staying out late at nights, caused his son to telephone the home of the woman friend to see whether his wife was indeed there. Though she was found to be there, the husband's suspicions were not allayed, and when the wife returned home that night he told her that she ought to have been home earlier, and when they went to bed they were still exchanging heated words. The husband, being in a temper, decided that he would leave the matrimonial home then and there, and told his wife that he would do so. She asked him whether he really intended going on this occasion, and he replied that he did. She then said to him: "If you go now do not "come back again," or words to that effect, making it quite clear that she was warning him that if he went she would in no circumstances take him back. Despite that warning, he went out in the middle of the night, telephoned to a friend at an hotel, and spent the night at the hotel. The wife, firm in her intention, thereupon had the lock on the house door changed. On the following evening, or a day or two later, the husband returned, managed to obtain entrance into the house, and said that he wished to resume cohabitation. The wife made it plain to him that she would not accept him back; and when the children of the marriage came home they persuaded their father to leave, as the wife said that if he did not go she would go herself. He therefore left the home; and husband and wife lived apart thereafter.

In January, 1955, the wife brought a petition against the husband for dissolution of the marriage on the grounds (a) of the adultery in 1945 and (b) of desertion. She admitted that she had condoned the adultery but alleged that it had been revived by the desertion in October, 1951. By his answer the husband denied the desertion and alleged that the wife had deserted him without cause; and he asked for the dissolution of the marriage on that ground and for the exercise of the court's discretion in his favour. By her reply to that answer the wife stated that she had caused the locks on the doors to be changed for the reason that before leaving the house the husband had threatened that he would strip the house of everything.

The commissioner, on January 13, 1956, granted the wife a decree nisi of dissolution on the grounds of adultery and of desertion, and rejected the husband's prayer in his answer. The commissioner found that the husband's offer to resume cohabitation was not a genuine offer such as was incumbent on the wife to accept or such as would terminate the desertion. He said that as the adultery had been revived by the husband leaving the matrimonial home and as adultery was the ground which always entitled a woman to refuse to take the husband back unless she chose of her own free will to do so, the adultery was the main ground of his decision; but that this wife was entitled to the decree for which she asked on both grounds.

The husband appealed.

Gordon Clover for the husband. The wife's warning, repeated several times in the firmest possible terms, that if the husband left home he could not come back, prevented desertion from starting, because there was no leaving against the will of the wife. The wife cannot complain that the husband failed to do what she there and then barred him from doing, namely, cohabiting with her. The desertion never began and therefore the adultery was not revived. Authority for that submission is to be found in *Barnett* v. *Barnett*, *per* Sachs J.,[1] and *Fishburn* v. *Fishburn*, *per* Willmer J.[2]; for by her conduct and words this wife decisively negatived the possibility of his return. Even if this husband did intend to bring cohabitation to an end, he did not go against the consent of his wife; and his conduct shows that he did not have a fixed and settled intention to go for ever. It is unreal in these circumstances to hold him a deserter. In *Barnett* v. *Barnett* [3] and *Fishburn* v. *Fishburn*,[4] here relied on, it was not the locking of the door per se which terminated the desertion, but the fact that the deserting spouse knew about it. So here the wife's warning affecting the husband's mind prevented desertion from starting. That applies the principle in *Herod* v. *Herod*,[5] that where the adultery of a deserted spouse had operated on the mind of a deserting spouse it would constitute reasonable cause for the deserter's refusing to come back.

---

[1] [1955] P. 21, 28; [1954] 3 All E.R. 689.

[2] [1955] P. 29, 39–41; [1955] 1 All E.R. 230.

[3] [1955] P. 21.

[4] [1955] P. 29.

[5] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.

[DENNING L.J. *Herod* v. *Herod* [5] is quite clear; but *Barnett* v. *Barnett* [6] and *Fishburn* v. *Fishburn* [7] decide that locking the door by the innocent party automatically terminates the desertion. That may be too strict a rule of law. It is Scots law that the innocent party must be ready to have the deserter back even after years have passed; but it is not English law.]

Lord Macmillan in *Pratt* v. *Pratt* [8] suggested that it was, for he said that if a petitioning husband "has made it plain to his "deserting wife that he will not receive her back, or if he has "repelled all the advances which she may have made towards a "resumption of married life, he cannot complain that she has "persisted without cause in her desertion." That dictum was cited with approval by Sachs J. in *Barnett* v. *Barnett* [9]—though it is conceded that in *Church* v. *Church* [10] Willmer J. said that it was obiter; and in *Bevan* v. *Bevan* (*No.* 2),[11] which is a decision tending against the present submission, the Divisional Court also doubted whether that passage in Lord Macmillan's speech applied in this country. *Barnett* v. *Barnett* [12] and *Fishburn* v. *Fishburn* [13] were also considered and distinguished in *Bevan* v. *Bevan* (*No.* 2).[14]

Secondly, even if this wife was entitled to a decree on the ground of the adultery revived by the desertion for a few hours only, the husband is also entitled to a decree on the ground that the wife, by refusing a reconciliation, had made herself a deserter. The commissioner's finding that the revived adultery constituted "just cause" for her refusal to take him back was not justifiable, for on the evidence that refusal was not at all influenced by his long-condoned and then revived adultery; and the "other "matters" of which she complained were not sufficiently grave and weighty to constitute just cause for that refusal. On the *Herod* v. *Herod* [15] principle, the revived adultery cannot be relied on because it had no effect on this wife's mind.

[DENNING L.J. The husband has to prove that she kept him out of the house without cause. The causes do not have to be listed and specified; and there is a finding here that the husband's offer to return was not such as it was incumbent on her to accept.]

---

[5] [1939] P. 11.
[6] [1955] P. 21.
[7] [1955] P. 29.
[8] [1939] A.C. 417, 420; 55 T.L.R. 910; [1939] 3 All E.R. 437.
[9] [1955] P. 21, 26.
[10] [1952] P. 313, 317; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441.
[11] [1955] 1 W.L.R. 1142, 1146; [1955] 3 All E.R. 332.
[12] [1955] P. 21.
[13] [1955] P. 29.
[14] [1955] 1 W.L.R. 1142, 1147.
[15] [1939] P. 11.

The court has to consider what was the cause of her refusal to take him back. [*Teall* v. *Teall*[16] was also referred to.]

D. McNeill for the wife. Desertion, whether constructive or normal, depends on the act of the spouse who effectively terminates the state of cohabitation. This husband effectively terminated cohabitation because, faced with the choice presented by the wife's warning words, he chose to go. *Barnett* v. *Barnett*[17] and *Fishburn* v. *Fishburn*[18] are distinguishable, for there the court was considering a state of desertion which had already begun, and the judges found that the desertion was terminated by the locking of the door. But the locking of the door was an act analogous to a separation order made by a court of competent jurisdiction; it was not analogous to the adultery in *Herod* v. *Herod*,[19] which set up a discretionary bar. The decision in *Pearson* v. *Pearson*,[20] applying *Lloyd* v. *Lloyd and Hill*,[21] is authority the other way, since it decided that, if there had been a completed act of desertion before the adultery, the fact that the adulterous party tried to effect a reconciliation did not avail her. In *Lloyd* v. *Lloyd and Hill*[22] Hodson J. said that even if the wife there was only in desertion for a few days she did not cancel the revival of the adultery by making an offer to come back.

In the present case the finding of the commissioner that there was no offer which it was incumbent on this wife to accept means that once there was desertion reviving the adultery that desertion was not terminated by this offer and it endured for the statutory period. This was a husband who had previously threatened to leave home and had packed his bags; the marriage was already in difficulties over sexual relations and the illegitimate child. On the facts and the law the judgment of the commissioner should be upheld.

DENNING L.J. stated the facts, and continued: On the facts that I have narrated it is quite plain that the husband was guilty of adultery. It is equally plain that the wife condoned it; but it is settled law that a subsequent desertion by the

---

[16] [1938] P. 250; 54 T.L.R. 960; [1938] 3 All E.R. 349.

[17] [1955] P. 21.

[18] [1955] P. 29.

[19] [1939] P. 11.

[20] [1948] W.N. 225; 64 T.L.R. 445.

[21] [1947] P. 89; 63 T.L.R. 110; [1947] 1 All E.R. 383.

[22] [1947] P. 89, 93.

C. A.
1956

BEIGAN
v.
BEIGAN.

Denning L.J.

husband, even for a short time—it may be for a few hours, even less than a day—can revive the condoned adultery. That was decided in *Beard* v. *Beard*.[1] So the first question to decide is whether the husband did desert the wife on this night when he left the house.

It has been argued before us by Mr. Clover that there was no desertion by the husband because the wife said: "If you go, "you are not to come back. I will not have you back." Mr. Clover supported his argument by reference to two cases, *Barnett* v. *Barnett*[2] and *Fishburn* v. *Fishburn*.[3] He said that, according to those decisions, if a wife locks the door against her husband, and makes it clear to him that she will not have him back, that terminates any desertion by him if it has once commenced; and he says that in this case the words of the wife just before the husband went—saying that she would not have him back—prevented any desertion from starting. I cannot agree with that argument. The husband plainly deserted his wife and must take the consequences.

I must say a word, however, about the cases of *Barnett*[4] and *Fishburn*.[5] In both those cases the husband and wife had for years lived a "cat-and-dog" life, and the tension between them eventually got to such a pitch that each of them, at about the same time, determined not to have anything more to do with the other and evinced that determination in a clear and unequivocal way. In *Barnett* v. *Barnett*[6] the husband left the matrimonial home because he had had enough of it, whereupon the wife promptly changed the lock so as to prevent his coming back. In *Fishburn* v. *Fishburn*[7] the parties continued to live in the same house, but the husband locked the wife out of his room, whereupon she fitted a Yale lock on her door so as to keep him out of hers. In each case the judge held that the husband was originally in desertion, but that his desertion automatically came to an end when the wife, by locking him out, evinced to her husband a firm and decisive determination that he should not return to her; even though her action had no effect at all on him. It was abundantly clear that neither party at any time within the three years before suit ever had the slightest desire or intention of resuming cohabitation with the other; yet the court refused any relief to either of them. Neither party was given a remedy.

---

[1] [1946] P. 8; 61 T.L.R. 555; [1945] 2 All E.R. 306.

[2] [1955] P. 21; [1954] 3 All E.R. 689.

[3] [1955] P. 29; [1955] 1 All E.R. 230.

[4] [1955] P. 21.

[5] [1955] P. 29.

[6] [1955] P. 21.

[7] [1955] P. 29.

I must say that I have considerable doubt whether those cases were rightly decided. There has since been a decision of the Divisional Court in *Bevan* v. *Bevan* (*No.* 2),[8] in which it was held that, even though a wife says in terms that she does not want to see her husband again, she does not thereby automatically terminate his desertion. The Divisional Court applied the reasoning of Henn-Collins J. in *Sifton* v. *Sifton*[9] and of Willmer J. in *Church* v. *Church*.[10] I, too, agree with that reasoning, and I must say that I see no distinction in principle between a wife's words and her actions. I should have thought that, if a wife locks the door against her husband, it does not automatically terminate his desertion any more than her own adultery would do. It all depends on whether it has any effect on the husband by preventing him from seeking a reconciliation. If he would never have returned in any case, then he remains in desertion, notwithstanding the locking of the door. I know that in Scotland it is necessary for the petitioner to prove that she was throughout the three-year period "willing to adhere" to her husband, but this has never been part of English law and I do not think it should now be introduced.[11]

I can well understand that in *Barnett* v. *Barnett*[12] and *Fishburn* v. *Fishburn*[13] the courts were reluctant to grant the wife a divorce for desertion when she was just as much at fault in locking her husband out as he was in leaving her. But the fact that both are equally at fault does not mean that neither of them is. Rather than refuse relief to either of them, I should have thought that a

---

[8] [1955] 1 W.L.R. 1142; [1955] 3 All E.R. 332.

[9] [1939] P. 221; 55 T.L.R. 339; [1939] 1 All E.R. 109.

[10] [1952] P. 313; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441.

[11] In the report of the Royal Commission on Marriage and Divorce, 1951–1955 (Cmd. 9678), the Commissioners considering the law of desertion in Scotland and its differences from English law in that respect, stated (in para. 163) that they had received a large volume of evidence from Scottish witnesses that the requirements as to proof of willingness to adhere on the part of the deserted spouse should be entirely abolished; and (para. 164) accordingly the Commissioners unanimously recommended "that the requirement as to proof of "willingness to adhere on the part "of the pursuer throughout the three-"year period of desertion should be "abolished. In future, to found an "action on this ground it should be "sufficient that the court is satisfied "that initially there was desertion, "i.e., separation against the will of "the pursuer and not by agreement; "and that the desertion has been "persisted in for not less than three "years; and that at no time during "that period has the pursuer refused "a genuine and reasonable offer by "the deserting spouse to return."

[12] [1955] P. 21.

[13] [1955] P. 29.

C. A.
1956

BEIGAN
v.
BEIGAN.

Denning L.J.

preferable solution would have been to have held that each party had deserted the other, and to have granted a divorce to each without drawing any distinction between them. After all, desertion is the deliberate withdrawal from life together without consent; and, if each party at the same time withdraws from the married life because it has become intolerable, each is guilty of desertion. A simple illustration is the case where a husband goes off to work in the morning, and neither party has then decided to leave the other; but during the day the husband decides never to return, and the wife packs her bag and leaves. There is no separation by agreement. Neither party has consented to the other going, but I should have thought there was in the circumstances desertion by each, and that after three years a decree could be granted without drawing any distinction between them. In many of these cases both parties are equally to blame for the breakdown of the marriage, and the only just solution is a decree of divorce on the ground of desertion by each without drawing any distinction between them. I said as much in 1950 in *Hosegood* v. *Hosegood*,[14] and I adhere to that view.

It is not necessary, however, to pronounce any final opinion on the cases of *Barnett*[15] and *Fishburn*[16] because they are very different from this case. In this instance we have the simple words of the wife: "If you go now, I will not have you back." In my judgment that does not prevent the husband's act from being an act of desertion. He deserted his wife when he left the house that night. His desertion revived the condoned adultery. The adultery is revived for all purposes, and therefore from that moment onwards he was a husband guilty of adultery. As such, when he came back the next day or a day or two later, the wife was not bound to take him back any more than a wife is bound, when she first finds out about her husband's adultery, to take him back. Mr. McNeill referred us to *Pearson* v. *Pearson*[17] and *Lloyd* v. *Lloyd and Hill*,[18] which warrant that proposition.

A further point was raised by Mr. Clover. He said that when the husband wanted to come back, and the wife would not have him in the house, the wife was then deserting the husband and that he is entitled to a decree on his answer. The commissioner found, however, that the return of the husband was not such that the wife could reasonably be expected to accept him. After all, he was in the circumstances a husband guilty of adultery; and the wife was not bound to take him back.

---

[14] [1950] W.N. 218; 66 T.L.R. (Pt. 1) 735.

[15] [1955] P. 21.

[16] [1955] P. 29.

[17] [1948] W.N. 225; 64 T.L.R. 445.

[18] [1947] P. 89; 63 T.L.R. 110; [1947] 1 All E.R. 383.

There is, however, one variation which I would suggest in the order. We should only grant the petition of the wife on the ground of adultery, and not on the ground of desertion. The husband's adultery, condoned but revived, is the real basis of the decree. I would vary the order of the commissioner to that extent. Otherwise I would leave it undisturbed.

Birkett L.J. I am entirely of the same opinion. It is true that the commissioner laid the greater stress on what my Lord has suggested was the real ground of his decision, namely, the adultery which had been committed by the husband in 1945 and which had been subsequently condoned, and subsequently revived. But the commissioner having given a decree on both grounds—namely, adultery and desertion—though I agree that the adultery is the main matter, I am bound to say that his decision could be supported on the second if need be.

The adultery in this case was admitted. Here was a marriage which, at the time of this hearing, had been in existence for about 25 years, and up to 1945 had been reasonably happy. But there then occurred the admitted adultery of the husband with another woman in the most painful and humiliating circumstances for the wife. There was the journey by the husband and the wife to see this woman so that the wife might be assured that the adulterous association was really at an end, and matters of that kind. There is no question at all that that was the matter which first disturbed the harmony of this married life, and it was admittedly the husband's fault.

It is said that that was forgiven by the wife, but it always seems to me very difficult for a wife to put a matter of that kind entirely out of her mind, and when subsequent events in the married life tend to revive those old memories it is extremely difficult to disregard it. In this case there were two such events. The first was that a child was born to this woman of which the husband in this case was the father. The second was that he had tried once or twice to induce his wife to take that child into their home, and she, feeling that she could not do so and that it could not be conducive to married happiness, had refused. But it had been a source of trouble.

Then occurred another event which I think revived, and must have revived, the memory of the adultery in her mind. In

October, 1951—the month in which the husband went away—there is no doubt at all from the evidence that he was suspicious of the wife because he thought that she was in fact conducting an adulterous association with other men. There was no ground for that suspicion, but I mention it merely for this reason, that when a wife in those circumstances is accused of adultery of which she is quite innocent, by the man who has disturbed the harmony of the married life by his own adultery, it is extremely difficult for a wife to be quite forgetful of those incidents in the past.

The other matter which ought to be mentioned in this background of the married life is that when this husband did go away in October, 1951, it was only the culminating point, as it were, of many threats to the wife that that was exactly what he would do. [His Lordship read from the evidence on this point, stated the facts as to the husband's eventually leaving the house on the night in October, 1951, and continued:] That is the background which the commissioner had before him at the hearing; and he found (and I think he was perfectly entitled to find) that there had in fact been desertion by the husband that night. It does not seem to be really contested that if it is a proper finding on the facts that there was desertion, then the condonation of the adultery in 1945 is wiped out; that adultery is revived, and she is, therefore, in the position of a wife who is entitled to go to the court and ask for a decree of divorce on the ground of the husband's adultery; and on that ground the commissioner granted her a decree.

On the other ground, namely, that the husband claims to be entitled to a decree because his wife did not really respond to the offer which he made to come back, we have had cited to us *Barnett* v. *Barnett*,[19] a decision of Sachs J., and *Fishburn* v. *Fishburn*,[20] a decision by Willmer J.; and it was argued by Mr. Clover, for the husband, on the strength of those cases, first, that there had in fact been no desertion at all that night because, when the wife said: "If you go, do not come back," that had the effect of allowing the husband to go in those circumstances, and that the act was really the wife's; or alternatively that, if there was desertion, it was brought to an end when the husband made his offer to return. I do not desire to say anything about those two cases here today. I think that they will need some careful consideration, because I observe that in *Bevan* v. *Bevan* (*No.* 2),[21] in the Divisional Court composed of Lord Merriman P. and

---

[19] [1955] P. 21.

[20] [1955] P. 29.

[21] [1955] 1 W.L.R. 1142.

Collingwood J., those two decisions were discussed. The language of Collingwood J. (with which the President agreed) is somewhat significant. He said[22]: "it is suggested that this case"—the one they were dealing with—"is really in the same class as "*Barnett* v. *Barnett*,[23] which is a decision of Sachs J., and the "similar case of *Fishburn* v. *Fishburn*.[24] But in my opinion those "cases are in quite a different category from the present. They "were not cases merely of words indicating that the wife had no "desire to see her husband again. In both those cases the "deserted spouse effectively prevented the other spouse from "approaching her by bolting the door against any advances "towards reconciliation, not merely metaphorically, but actually "and physically, and I think that those cases go a long way "further than anything that can be found in the evidence in the "present case, which really amounts to this, that this wife, "suffering, and not unjustly, from a deep sense of grievance, "says to a husband who apparently is showing no contrition for, "and almost no recognition of what he has done, 'I do not want "'to see you any more.' In my opinion that cannot exonerate "him from the necessity of doing something to bring an end to "the state of desertion which he started. It requires something "far more than that to relieve him of the necessity of doing "something to bring the state of desertion to an end."

In *Bevan* v. *Bevan* (*No.* 2)[25] the wife had said shortly after the separation that she did not want to see her husband again, and she wanted a divorce. I think that the commissioner in the present case, having in mind the background of the married life which I have just sketched briefly—in which the wife, so far as I can see, was in no way to blame for anything that occurred—came to the conclusion that the blame, if it can be apportioned, was entirely due to the husband. There was the initial adultery which brought all this misery in its train. There was his unjust suspicion of the wife. There were the continual threats "I will "leave you." There was the final threat when the husband did leave and said: "I will strip the place of furniture." With all that background the commissioner said on this very important point: "It is said, and it has been argued before me, that "because he was only away for a very short time, and then came "back and said that he wished to resume cohabitation, there "was a genuine offer which the wife was not entitled to refuse,

---

[22] [1955] 1 W.L.R. 1142, 1147.

[23] [1955] P. 21.

[24] [1955] P. 29.

[25] [1955] 1 W.L.R. 1142.

C. A.
1956

Beigan
v.
Beigan.

Birkett L.J.

"and that it terminated the desertion. I do not accept that "view. Primarily, I do not accept it because, the adultery "having been revived, the situation was exactly the same. It "has never been condoned, and as I understand it in law, "adulterous husbands, merely by coming back and offering to "renew cohabitation, cannot terminate a desertion. If they "could it would be some sort of compulsory condonation which "is unknown to the law. Apart altogether from the adultery I "should have been prepared to find—and I mention this in case "this matter goes to appeal, and anyone may think differently "about the first part of my judgment—that there never was, in "this case, an offer by the husband which it was incumbent on "the wife to accept."

The commissioner is there saying: "If I should happen in the "view of any other court to be wrong in my view about the "desertion wiping out the condonation, and putting the wife in "the position of a wife who sues for divorce on the ground of "adultery, then I desire to say, having reviewed all the background and all the evidence, that there never was in this case "an offer by the husband which it was incumbent on the wife "to accept."

A little later he said: "There is no evidence before me that "he came back and said: 'Well, I accused you of adultery; "'I am sorry; I was wrong. I put all that suspicion right "'behind me. There will be no more of that. There will be no "'more of my ordering you to be in at nine-thirty. There will "'be no more of my threatening to leave you if our sexual "'desires do not happen to coincide.' Nothing of that kind; "and I should have been quite prepared to hold that there never "was an offer here which she was bound to accept."

It is not necessary to discuss that part of the case further, because, in my opinion, the commissioner was perfectly entitled to do as he did in this case, and to say: "I am ready to grant "this wife a decree of divorce on the ground of adultery and "admitted adultery of the husband, admittedly condoned, and "which I hold to be revived by the act of desertion in October "of 1951." I agree with the judgment which my Lord has expressed, and the alteration in the order to which he referred.

Parker L.J. I have come to the same conclusion, and base my decision on the short ground that when the husband left the matrimonial home that night or early in the morning in October, 1951, he was guilty of an act of desertion which revived the previous adultery which had been condoned.

Mr. Clover has argued strenuously that the fact that the wife on that occasion said: "If you go now, do not come back "again" meant that he never deserted at all. Apart from authority, that seems to me an astonishing proposition. It is agreed that if the wife had said nothing, and he had left that night, he would be in desertion. How can it make any difference that the wife, in a last effort to make him stay, points out the consequences, namely: "If you really are going now, then do "not expect me to take you back"? It seems to me wholly artificial to say that because she used those words, the husband was not in desertion at all.

It is said, however, that that is the logical result of the decisions in the two cases referred to of *Barnett* v. *Barnett*[26] and *Fishburn* v. *Fishburn*.[27] Speaking for myself, I think that those are completely different cases concerning a possible situation once desertion has actually occurred. It may be, however, that this court will hereafter have carefully to consider those cases if they really go the length of suggesting that words used as they were in this case prevented desertion taking place. Once the act of desertion is proved, it seems clear that the adultery previously condoned is revived, and is revived for all purposes; and, accordingly, when the husband did come back a day or two or three days later to the matrimonial home, I think that the wife was perfectly entitled to refuse to negotiate with him, or to have him back, just as she would have been immediately after the original adultery. Accordingly, I agree with the order proposed.

Appeal dismissed.
Decree nisi on the grounds of adultery.
Decree amended by deleting clause as to desertion.

Solicitors: *John Hands & Son for K. Maxwell Brown, Liverpool; Mawby, Barrie & Letts for Silverman & Livermore, Liverpool.*

M. M. H.

---

[26] [1955] P. 21.

[27] [1955] P. 29.

1956
Feb. 13.

Willmer J.

BRADLEY *v.* BRADLEY.

Husband and Wife—Maintenance—High Court—Periodical payments—Power to secure for wife's life—Wilful neglect to maintain—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23.

On a wife's application for an order for periodical payments and for the securing of those payments under section 23 of the Matrimonial Causes Act, 1950:—

Held, that the husband, who was found to be guilty of wilful neglect to provide reasonable maintenance, should be ordered to make periodical payments of £1,800 a year, less tax, of which the sum of £500 should be ordered to be secured for the wife's life (and not only for their joint lives), and that an order should be made accordingly.

Order in *McLellan* v. *McLellan* [1954] P. 138; [1954] 1 All E.R. 1 followed. Dicta of Denning L.J. in *King* v. *King* [1954] P. 55, 63; [1953] 2 All E.R. 1029 applied.

Dicta of Hodson J. in *Scott* v. *Scott* [1951] P. 245, 248; [1951] 1 All E.R. 216 not followed.

APPLICATION by wife for an order for periodical payments under section 23 of the Matrimonial Causes Act, 1950,[1] and for the securing of such payments.

The marriage took place in Australia in 1929 but the parties, for all practical purposes, resided in this country throughout their married life, mainly in the neighbourhood of Oxford, where the husband had his business. Early in 1955 the husband acquired the lease of a house in St. John's Wood in London which became the matrimonial home, the wife living there all the time and the husband residing with her during such periods as his business did not require him to be in Oxford. There was also a period when he went away for a holiday by himself. There were disputes between the parties, including disputes arising from the amount of money that the husband was giving to his wife; and on July 23, 1955, there was a final quarrel, about the amount of money which the husband was providing, the wife alleging (although the husband denied it) that it was accompanied by some sort of assault upon her. The husband left the wife, and they did not live together again.

---

[1] Matrimonial Causes Act, 1950, s. 23: "(1) Where a husband has "been guilty of wilful neglect to pro-"vide reasonable maintenance for his "wife or the infant children of the "marriage, the court, if it would "have jurisdiction to entertain pro-"ceedings by the wife for judicial "separation, may, on the application "of the wife, order the husband to "make to her such periodical pay-"ments as may be just; and the "order may be enforced in the same "manner as an order for alimony in "proceedings for judicial separation.

"(2) Where the court makes an "order under this section for period-"ical payments it may, if it thinks "fit, order that the husband shall, to "the satisfaction of the court, secure "to the wife the periodical payments, "and for that purpose may direct "that a proper deed or instrument to "be executed by all necessary parties "shall be settled and approved by "one of the conveyancing counsel of "the court."

The wife continued to reside in the matrimonial home in St. John's Wood. The husband continued to pay all the outgoings in relation to that house, including the ground rent, Schedule A tax, rates, electricity, heating, etc., representing about £250 a year. The lease was purchased for a figure round about £5,000. In addition the husband had been paying his wife the sum of £7 a week in cash since about April, 1955, and there was some provision for the purchase of clothes on credit.

The basis of the wife's application was that that provision for her was not sufficient and did not provide her, in all the circumstances, with reasonable maintenance. She alleged, and it was not denied, that her husband was a man of very considerable means. The figures put forward in his affidavit of means were not challenged by the wife. That affidavit showed that he had capital assets amounting in value to very nearly £100,000. His average income for the last three years was put forward as some £8,051. The last of the three years which formed the average was, however, the year with the smallest income, his affidavit showing that for the year ended April 5, 1955, his income was only £6,163.

Roger Ormrod for the wife. Although the wife is not necessarily entitled to such maintenance as she might receive were she the innocent party in divorce proceedings, she is entitled to a reasonable maintenance having regard to all the circumstances of the case, including the length of the marriage, the facilities which a wife in the position of this wife is entitled to expect and the means of the husband. The maintenance which she has been receiving has not been reasonable judged by this standard and the evidence shows that the husband knew this.

If an order be made in the wife's favour, it is submitted that under section 23 of the Matrimonial Causes Act, 1950, part of the sum can be ordered to be secured during her life. The only reason for limiting the securing of periodical payments to the joint lives of the parties is the construction which was put upon those words when used in connexion with payments under an order for restitution of conjugal rights in *Clutterbuck* v. *Clutterbuck*[2] and *Tangye* v. *Tangye*.[3] *Clutterbuck* v. *Clutterbuck*[4] decided that the court had jurisdiction to order that periodical payments should be secured for the life of the wife, whereas the later case of *Tangye* v. *Tangye*,[5] which was also a decision of a court of first instance, decided that the securing of periodical payments was to be limited to joint lives. The argument which found favour with the court was that an order for restitution of conjugal rights was one of the two remedies for desertion, the other being a decree of judicial separation, as to which there was only power to order the securing of permanent alimony during joint lives. It was said that it would be entirely anomalous if a deserted wife, by obtaining an order for restitution of conjugal rights, could obtain maintenance secured for life, while if she sought a decree of judicial separation for the same matrimonial offence she was limited to maintenance secured for joint lives.

Since the passing of the Matrimonial Causes Act, 1937, a wife can obtain a decree of divorce on the ground of desertion and the reasoning in *Tangye* v. *Tangye*[6] is therefore no longer valid. So far as cases actually decided under section 23 of the Matrimonial Causes Act, 1950, have dealt with the question of the duration of secured maintenance, the weight of authority, although it is merely persuasive, is clearly in favour of extending the period of security to the life of the wife. In *King* v. *King*[7] Denning L.J. clearly expressed this view, and, although his statement on this point was obiter, his judgment was concurred in by the other members of the court. It is therefore an obiter dictum of considerable weight to which greater importance should be attached than to the obiter dictum to the reverse effect by Hodson J. in *Scott* v. *Scott*.[8] Further, in *McLellan* v. *McLellan*[9] Karminski J. made an order under section 23 by which part of the payments were to be secured for the life of the wife.

Armstead Fairweather for the husband. The complaint in this case, in order to succeed, must import an element of wrong, and the husband's conduct is not to be measured by the sole test of what is reasonable or by what is wilful, but rather by a combination of the two. On the proved facts of this case the wife is being well maintained and formulated no demand for more before she issued her summons.

---

[2] (1913) 29 T.L.R. 480.

[3] [1914] P. 201; 30 T.L.R. 649.

[4] 29 T.L.R. 480.

[5] [1914] P. 201.

[6] Ibid.

[7] [1954] P. 55; [1953] 2 All E.R. 1029.

[8] [1951] P. 245; [1951] 1 All E.R. 216.

[9] [1954] P. 138; [1954] 1 All E.R. 1.

If, contrary to this submission, an order is made against the husband and it is thought fit that part of the sum so ordered should be secured, then it is further submitted that the duration of the security should be limited to joint lives. The wording of section 23 (2), which gives the court power to order security, is ". . . the husband shall . . . secure to the wife *the* periodical "payments." This clearly means the periodical payments referred to in section 23 (1), namely, periodical payments such as were formerly made on disobedience to an order for restitution of conjugal rights, and which could not be secured beyond the joint lives of the parties: *Tangye* v. *Tangye.*[10] The parties may resume cohabitation or their status may be changed by divorce—in either case the order would go and in any event such an order would render nugatory the provisions of the Inheritance Act, 1938, as amended.

Clutterbuck v. *Clutterbuck*,[11] in which it was held that the court had a discretion to order the securing of payments to the wife for her life, was rejected in *Tangye* v. *Tangye*,[12] in which it was said to have been a decision contrary to the general trend of authority.

There are, in the cases dealing with secured provision under section 23, conflicting obiter dicta whether the duration of such provision is limited to joint lives. In *Scott* v. *Scott* [13] Hodson J. stated that, upon an order on the ground of wilful neglect to provide reasonable maintenance, a wife appeared to be entitled to claim security only for joint lives. In *King* v. *King*,[14] on the other hand, Denning L.J. expressed the view that periodical payments under section 23 could be secured to a wife during her widowhood. This statement was at the highest merely obiter dictum. [Counsel then stated that, having himself been engaged in *King* v. *King*,[15] he had no recollection of argument having been addressed to the court on the point of the duration of the secured provision. The judgment, he said, had been delivered after the intervention of the long vacation and he submitted that the passage as to the duration of the secured provision had been inserted in the judgment per incuriam.]

The report of *McLellan* v. *McLellan* [16] refers to the order for security there made by Karminski J. as part of the recitation of the facts of a previous hearing. There is no reference in the judgment itself to the reasons which may have moved the court or to any argument addressed to it on this point. It is submitted, therefore, that it is unsatisfactory even as a persuasive authority, and in view of the wording of the section and the general principles which have governed the securing of periodical payments the order in the present case should be limited to security for joint lives.

---

[10] [1914] P. 201.
[11] 29 T.L.R. 480.
[12] [1914] P. 201.
[13] [1951] P. 245.
[14] [1954] P. 55.
[15] Ibid.
[16] [1954] P. 138.

WILLMER J. referred to the facts substantially as set out above and continued: In those circumstances it is said that £7 per week plus the discharge of the outgoings in respect of the matrimonial home is very far from being reasonable maintenance for the wife of such a husband. As a matter of arithmetic I think that both counsel substantially agree that, roughly speaking, the £7 per week plus the use of the house is worth to the wife somewhere about £650 net per annum. If that sum were fully grossed up, allowing for income tax at the standard rate (and again, I think, it is an agreed figure on the part of both counsel), it would be about £1,062 per annum.

Mr. Fairweather, for the husband, has contended, first, that, on the figures which we have in this case, it is not possible to say that this wife has been given other than reasonable maintenance. Secondly, Mr. Fairweather has contended that there is nothing to show that there has been any wilful failure on the part of the husband. In support of his argument he has called my attention to the decision of Hodson J. in *Scott* v. *Scott*.[1] The point in relation to which that decision has been cited to me is this, that, as Hodson J. pointed out, the jurisdiction which I am exercising under section 23 of the Act is something very different from that which is exercised by the court in assessing maintenance where there has been, for instance, a decree of divorce. Hodson J. is reported as saying [2]: "It seems to me that, provided the existing state of affairs is "that the husband is paying, and has been paying, what is "prima facie reasonable maintenance for his wife and two "children, as I find is the fact in this case, the maintenance "does not become unreasonable when tested against the amount "which a wife might obtain if she had succeeded in some pro"ceedings which she might have taken, or which she indeed might

---

[1] [1951] P. 245; [1951] 1 All E.R. 216.

[2] [1951] P. 245, 248.

"yet take." Again Hodson J. said[3]: ". . . wilful neglect "is not automatically established when it is held that the amount "paid is less than the court might order in the case of a guilty "husband and an innocent wife in proceedings brought, for "example, on the ground of cruelty or adultery or desertion . . ."

Applying that statement of principle, therefore, Mr. Fairweather contends that it would be quite wrong for me to approach this case on the basis of what I might think would be a reasonable amount to award by way of maintenance if there had, for instance, been a decree of dissolution.

On behalf of the wife Mr. Ormrod, I think, does not dispute that proposition, but he contends that one must approach the problem in a case such as this by deciding, in the first instance, what is a reasonable sum for a wife in this position, having regard to all the circumstances of the case; and he contends that, bearing in mind that this marriage has subsisted for over 25 years and that the husband is a man of substantial property with a very substantial income, the wife of such a person should reasonably be expected to spend quite a substantial sum of money per annum on clothes, for instance. It would be expected, he contends, that she would have some modicum of domestic assistance, and that if she did not actually possess a motor-car she would, at least, have the facility for obtaining motor transport. And lastly he contends that it would be reasonable to expect a wife in that position to be able to afford a holiday from time to time. All that has to be considered, as well as the rate of housekeeping which would be appropriate to a woman in this position, and the style of house in which she could be expected to live.

In the circumstances Mr. Ormrod contends, contrary to Mr. Fairweather's argument, that he has abundantly established that the amount which this husband has been allowing this wife cannot be regarded as reasonable maintenance in the circumstances of these parties.

On the other aspect of the case it should, I think, be put on record that there has been a previous hearing of this case, when Mr. Fairweather quite clearly took the point in argument that there had never been any wilful failure on the part of the husband, for the reason that he had never been even asked to provide more maintenance than he has been providing. As I understood it, what was alleged was that the first he knew of any dissatisfaction on the part of the wife was the issue of this summons. There was some controversy between counsel on that occasion as to what the true facts were, and I allowed an adjournment to enable further evidence to be filed in the shape of affidavits sworn by the representatives of the solicitors on both sides. But I must say at once that those affidavits do not carry the matter any further because, so far as I can see, they are restricted to what took place by way of negotiation between the solicitors subsequent to the date when the summons was issued. That, of course, does not help me because, as pointed out by Mr. Fairweather, I must look at the case as at the time of the issue of the summons.

---

[3] [1951] P. 245, 249.

However, on the resumption of the hearing today, Mr. Ormrod applied for leave to call his client to give evidence and I acceded to that on the basis that Mr. Fairweather should have equal facilities for calling his client. The wife did give evidence and was cross-examined. The husband was not called to give evidence. The wife said that during the time the parties were at Oxford the husband was in the habit of providing her with £4 every week simply as pocket money. She was not expected to keep house out of that, for the reason that the husband, who is in the catering trade, himself purchased all the food requirements for the household. So this wife was living without any financial responsibility to keep house or anything of that sort, and had £4 per week in her pocket to spend as she liked. The wife said that after the removal to London at the beginning of 1955 she found that the £4 a week, which she had had in Oxford, was not sufficient, and I gather that it was not sufficient for two reasons: first, she found living more expensive in London, and secondly, she did not have her husband with her all the time providing all the food. He was normally only there during week-ends, and it was only during week-ends that he would bring foodstuffs with him for the household. The rest of the time she had to look after herself. In those circumstances she says that she found £4 a week was not enough, and she told her husband so.

The result of that complaint on her part was that about April, 1955, the husband increased his allowance to £7 per week; otherwise the arrangement still went on as before. The wife was left substantially by herself except for week-ends. The husband continued to supply foodstuffs at week-ends. The wife also, as I understand it, had an account at one of the well-known London stores where she was able to obtain clothing on credit, the husband paying the accounts from time to time. The wife's case is that £7 per week was not nearly enough for one living in those conditions. She says that that is what the quarrel on July 23, 1955, was all about.

The husband, however, refused to consider an increase, and, as I have already said, he in fact left her on that date, following what must have been a very bitter scene. The wife said that the parties met again at the Cumberland Hotel some time about the end of August, 1955, on a Sunday, and that, at that interview, the husband asked her for a separation and said that, if she would agree to it, he would see that she was well provided for, but that, if she would not agree to it, he would thereupon desert her and leave her with no money at all. The wife did not agree to a separation. She said then, as she has said today, that she would still like to have her husband back. It is fair to say that the husband, although he did not return to cohabitation with the wife, has not in fact carried out his threat to give the wife no money at all, for he continued to pay the £7 per week. But that, on the wife's evidence, was a sum which to his knowledge the wife was saying was inadequate, even when taken in conjunction with her continuing to reside at the husband's expense in the matrimonial home.

That is the wife's case and, as I have said, the husband was not called to give any evidence to the contrary. I must therefore, I think, conclude that something on the lines of what the wife has described must have taken place at that interview in August, 1955.

In those circumstances it seems to me that whatever the husband has done he has done wilfully and knowing that what he has done has been something with which the wife did not agree. The only question, therefore, is whether the amount which he has been providing his wife is a reasonable amount in the circumstances. If it is not, it seems to me that the only conclusion to which I could come is that there has been a wilful failure on his part to provide what would have been reasonable.

Notwithstanding the observations of Hodson J. in *Scott* v. *Scott*,[4] which I have taken fully into consideration, I am of the opinion that Mr. Ormrod's argument is well founded. I reach that conclusion quite regardless of what such a wife might be expected to get in the event of successful divorce proceedings. It seems to me that reasonable maintenance for a wife, in the position of this wife, would be something considerably in excess of that which she is in fact getting from this husband.

---

[4] [1951] P. 245, 248, 249.

How much she ought to get is, I suppose, very much a jury question, and I can only make my own assessment, for what it is worth. There was some talk at one time about the possibility that I might adjourn this matter to a registrar to quantify the amount which the husband should pay if I were of the opinion that the charge of wilful failure to provide reasonable maintenance had been made out. But I see no point in putting the parties to further costs in having another hearing before the registrar, particularly as all the facts on which the registrar could go are already before the court. Having already arrived at the opinion, as I have, that this husband did fail, and wilfully fail, to provide the wife with reasonable maintenance, I propose to make an order for periodical payments at the rate of £1,800 a year, less tax.

There is a further point to be considered, and that is as to whether part, at any rate, of that sum should be secured, and that point in itself has given rise to yet a further argument, because the parties are at issue as to whether I can order security only for joint lives, or whether the wife is entitled to a secured provision for her life, as she would be, for instance, in the event of divorce proceedings. I would say at once, having regard to the husband's capital assets, that I have no doubt that this is a case in which a part of the periodical payments which I have ordered ought to be secured.

I will deal first with the question whether the security should be for joint lives only or for the life of the wife. Upon that question Mr. Fairweather draws my attention to the actual wording of subsection (2) of section 23 of the Matrimonial Causes Act, 1950, which provides that all the court has power to do is to secure to the wife "*the* periodical payments." That necessarily implies, as I follow the argument, that the security shall be limited to the periodical payments previously mentioned, i.e., payments to be made during the joint lives of the parties. The curious thing is that counsel have been able to refer me to reports of cases in which there have been dicta by judges on both sides. In *Scott* v. *Scott*,[5] to which I have already referred, Hodson J. is reported as saying[6]: "In the event of divorce, she"—that is the wife—"is entitled to claim maintenance to be secured for her for life as opposed to the period of joint lives, which appears to be the utmost that can be obtained under section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949." Section 5 of the Act of 1949 is, of course, the same as section 23 of the 1950 Act. On the other side I have the observations made by Denning L.J. in *King* v. *King*,[7] where he said[8]: "... under section 23 the "court can order the husband to secure the payments by a deed of "covenant, depositing some of his property as security and "covering her, not only during their joint lives, but also during "widowhood." It should be said straight away that both the remarks of Hodson J. in the one case[9] and those of Denning L.J. in the other[10] were made obiter. Mr. Fairweather, who was himself engaged in *King* v. *King*,[11] said that to the best of his recollection there had been no argument on that point. Certainly it was not necessary for the decision of the case; and he asks me to say that that passage in the judgment, which was a reserved judgment delivered only after the intervention of the long vacation, was inserted per incuriam. I am bound to note, however, that although the phrase only occurs in the judgment of Denning L.J., it was a judgment which was concurred in by both the other members of the court, neither of whom gave any separate judgment beyond expressing concurrence.[12]

---

[5] [1951] P. 245.

[6] Ibid. 248–249.

The matter does not quite stop there, because I have been referred to one case where an actual order has been made providing a wife with security for her life. That is *McLellan* v. *McLellan*,[13] which is reported in the Law Reports on another point; the only place where this particular point appears is in the All England Law Reports. In that case it is reported that Karminski J. found the husband's annual income to be £3,750, the wife's to be £250, and ordered the husband to pay £850 a year, less tax, during the joint lives, together with a further £150 a year, less tax, to be secured to the wife for her life. It is fair to say that that is merely set out in the recital of the facts of the case; the judgment is only reported on another point, and I have not had the benefit of reading what Karminski J. may have actually said with regard to this particular point in the course of his judgment, nor do I even know what argument, if any, was addressed to him on the subject.

Faced as I am with dicta both ways, I think that the only course I can take is to follow what has been already done by Karminski J., especially as that course is supported by a dictum pronounced in the Court of Appeal. In the circumstances it is

---

[7] [1954] P. 55; [1953] 2 All E.R. 1029.

[8] [1954] P. 55, 63.

[9] [1951] P. 245, 248.

[10] [1954] P. 55, 63.

[11] [1954] P. 55.

[12] Ibid. 66.

[13] [1954] P. 138; [1954] 1 All E.R. 1.

1956

BRADLEY
v.
BRADLEY.

Willmer J.

proper, in my judgment, following that case of Karminski J.'s,[14] to make an order in this case that part of the wife's periodical payments shall be secured for her life.

The only other matter to refer to now is the question of quantum. It is, I think, accepted by both sides that if I am to make any order with regard to furnishing security it would be convenient to include, with the order for security, some provision for security of tenure of the house. Mr. Ormrod has suggested that that object could be achieved by requiring the husband to convey his interest in the house to trustees to hold for the benefit of the wife during her life. I think that is a proper provision to make. How much that is worth as an annual amount is a thing that I think I shall leave to the parties to agree, or, failing agreement, to take before the registrar. What I do decide is that of the total of £1,800 a year, which I have already ordered, the sum of £500 a year should be secured for the life of the wife. As I have said, I will leave the parties to agree, if they can, or, failing that, to take before the registrar the question of how much of that £500 is represented by the annual value of the house.

Order accordingly.

Solicitors: *Kenneth Brown, Baker, Baker; Herbert & Gowers & Co.*

E. J.

---

[14] [1954] 1 All E.R. 1.

1956
March 27;
May 15.

Willink, Dean of Arches.

[COURT OF ARCHES, CANTERBURY.]

In re ST. MARK'S CHURCH, LINCOLN.

Ecclesiastical Law — Faculty — Burial ground — Disused churchyard— Proposed user of part as footpath and omnibus shelter—Whether omnibus shelter a "building" within meaning of section 3 of Disused Burial Grounds Act, 1884 (47 *&* 48 *Vict. c.* 72).
Cemetery. "Building."

A faculty was sought to adapt part of a disused churchyard as a footpath and to suspend a covering over the footpath to protect persons using the same from the weather:—

Held, (1) that the court had no jurisdiction to grant the faculty since the proposal involved the erection of a structure which was

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

a "building" within the meaning of section 3 of the Disused Burial Grounds Act, 1884,[1] and which was therefore prohibited by that Act.

St. Nicholas Acons v. *London County Council* [1928] A.C. 469; 44 T.L.R. 656 applied.

(2) That a faculty would be granted authorizing the petitioners to adapt and use part of the churchyard as a footpath, but not to erect or suspend any covering over that part of the churchyard.

In re Bideford Parish [1900] P. 314; 16 T.L.R. 540 applied.

Decision of Macmorran Ch., ante 166; [1955] 3 All E.R. 699 affirmed.

Appeal from Macmorran Ch., delivered on November 21, 1955, at Lincoln, refusing the grant of a faculty to the Reverend Prebendary Arthur Oswald Jones, vicar, and two churchwardens of St. Mark's Church, Lincoln, and the Lincolnshire Road Car Co. Ltd., who sought authorization to adapt part of the disused churchyard appurtenant to St. Mark's Church, so that it might form part of a footpath which the company proposed to construct, and so that a covering might be suspended over it to protect persons using the same from the weather. The petition was supported by unanimous resolutions passed by the Parochial Church Council of St. Mark's Church, and was unopposed.

The facts appear fully in the judgment.

Cur. adv. vult.

W. S. Wigglesworth for the petitioners. The petition raises two questions: (1) can a faculty issue authorizing consecrated land to be used as a footpath for secular purposes, and (2) if so, does the structure which it is proposed to erect over the footpath come within the meaning of a "building" prohibited by section 3 of the Disused Burial Grounds Act, 1884? As to the first question, a faculty can so issue in respect of a private right of way (*St. Gabriel, Fenchurch Street (Rector, etc.)* v. *City of London Real Property Co. Ltd.*[2]), and as to a public right of way (*In re Bideford Parish*[3]). This is supported by *Corke* v. *Rainger*,[4] which suggests no limit to secularization; there is no need to limit secularization to cases where the approaches to a church or churchyard are concerned, as suggested in *St. Nicholas Acons* v.

---

[1] Disused Burial Grounds Act, 1884, s. 3: "It shall not be lawful "to erect any buildings upon any "disused burial ground, except for "the purpose of enlarging a church, "chapel, meeting house, or other "place of worship."

[2] [1896] P. 95.

[3] [1900] P. 314; 16 T.L.R. 540.

[4] [1912] P. 69, 74.

London County Council.[5] The petitioners seek a right of way for their servants and passengers, and this is a private right, for although the passengers form part of the general public, they are only that part of the travelling public which uses the services provided by the company.

As to the second question, while it is clear that section 3 of the Disused Burial Grounds Act, 1884, applies to this burial ground, the section does not prohibit what the petitioners now seek to do. In *St. Botolph, Aldersgate Without*[6] an arcade built to protect frescoes on a churchyard wall was held not to be a "building" within the meaning of the section, but in *St. John's, Hampstead*[7] a columbarium was held to be such a building. Subsequently the proposals in that case were amended so as to be outside the section and were approved in chambers. In *Paddington Borough Council* v. *Attorney-General*[8] Lord Halsbury L.C. considered that the object of the Disused Burial Grounds Act, 1884, was to prevent disused burial grounds from becoming building ground and to keep them free as places of exercise, ventilation and recreation. In *Bermondsey Borough Council* v. *Mortimer*[9] a urinal was held to be a "building" within the meaning of the Act, and in *St. Nicholas Acons* v. *London County Council*[10] an electricity transformer chamber which would have been built below the surface of the churchyard was also held to be a "building." This latter case overruled *In re St. Nicholas Cole Abbey*,[11] *In re St. Benet Fink Churchyard*[11] and *In re St. Benet Sherehog*,[11] where faculties for similar transformer chambers had been granted.

The covering which the petitioners now seek to erect is analogous to that in *St. Botolph, Aldersgate Without*[12] and is therefore not a "building" for the purpose of the Act, and its presence will not make the land building ground. The land will remain free for exercise. Further, the building (if such it is) will not be erected *upon* a disused burial ground, since it will be so constructed that there is no contact between it and the burial ground. In all other cases the building has been erected *upon* ground, and this case is thus clearly distinguishable.

John Ellison as amicus curiae. The petitioner company is a commercial undertaking and there is no direct authority for the grant of a faculty to such a body; the court has no jurisdiction to grant the right sought, since the true nature of what the petitioners seek is a licence or a lease and not an easement. (For all practical purposes they seek absolute possession.) In *Reilly* v. *Booth* [13] it was held that if the general effect of a contract is to pass the right to the exclusive possession of land, even though subject to restrictions of user, it is a lease and not an easement. This view is supported in *Copeland* v. *Greenhalf*,[14] where the right in fact exercised and claimed by prescription amounted virtually to a claim to the whole beneficial user of the servient tenement, and was held to be too extensive to constitute an easement in law. In *In re Ellenborough Park* [15] this jus spatiandi was further considered.

---

[5] [1928] P. 102, 112.

[6] [1900] P. 69.

[7] [1939] P. 281.

[8] [1906] A.C. 1, 3.

[9] [1926] P. 87.

[10] [1928] A.C. 469; 44 T.L.R. 656.

[11] [1893] P. 58, 66n.; Tristram's Judgments 274.

[12] [1900] P. 69.

The Disused Burial Grounds Act, 1884, must be read in conjunction with the Open Spaces Act, 1887, and the words " land " or " burial ground " must be taken to be governed by the common law rule that land includes the air space above it. See Coke on this subject, which was fully analysed and discussed by Hahn J. in *Swetland* v. *Curtiss Airports Corporation*,[16] who was upheld on appeal.[17] It follows, therefore, that any building occupying air space over a disused burial ground is a building *upon* a disused burial ground, and therefore the erection proposed by the petitioners is forbidden by the Act. Neither " on " nor " upon " is an operative word, and they are not defined in the appropriate definition sections. They are merely a nexus between two operative defined words, " building " and " burial ground." " On " in the same context is synonymous with " in " or " within." For example, " a memorial stone *on* a grave *in* a burial ground."

May 15. WILLINK, Dean of Arches, read the following judgment: This is an appeal by the vicar and churchwardens of the parish of St. Mark, Lincoln, and the Lincolnshire Road Car Co. Ltd. from a decision of the learned Chancellor of the Diocese of Lincoln, the matter arising upon a petition dated September 16, 1955. On the hearing of the appeal Mr. Wigglesworth of counsel appeared for the appellant company. By the courtesy of the Dean of Westminster and with the consent of the appellants' counsel I sat to hear the appeal in the Deanery of Westminster. In view of the fact that the petition, though unopposed, raised questions of importance I invited Mr. John Ellison of

---

[13] (1890) 44 Ch.D. 12.

[14] [1952] Ch. 448; [1952] 1 T.L.R. 786; [1952] 1 All E.R. 809.

[15] [1956] Ch. 131; [1955] 3 All E.R. 667.

[16] 1930 U.S.Av.R. 21, 29.

[17] 1932 U.S.Av.R. 1.

1956

St. Mark's Church, Lincoln, *In re.*

Willink, Dean of Arches.

counsel to attend the court as amicus curiae. I am greatly indebted to Mr. Ellison for the assistance he gave to the court.

By their petition the petitioners sought authority for the use of a small part of a closed churchyard as part of a projected omnibus station. Included in the use prayed for was a proposal to roof the area in question in order that those using the station should be protected from the weather. The learned chancellor took the view that apart from the proposed roof the petition could and should be allowed, but that the proposed roof constituted such a structure as is prohibited by the combined operation of the Disused Burial Grounds Act, 1884, s. 3, and the Open Spaces Act, 1887, s. 4,[1] and the definition of "burial "ground" in the Open Spaces Act, 1906, s. 20.[2]

The facts of the case are not in dispute, and I have not thought it necessary to require affidavits to add to the evidence, including plans, given in the consistory court by Mr. A. A. Briggs, an architect employed by the British Transport Commission.

The land in question is a small oblong projection, 26 feet by 6 feet, at the southern end of the western boundary of the churchyard. The churchyard was closed for burials by an Order in Council dated February 8, 1855. There are no human remains in the area in question. The whole western wall of the churchyard is dilapidated, and if the company is permitted to carry out its plan it is prepared to undertake to rebuild its whole length together with a further length on the north side of the churchyard at a cost of about £1,000 and to a design to be approved by the parochial church council. The small piece of land has no amenity value, and the vicar and churchwardens, in supporting the petition, are acting with the unanimous authority of the parochial church council.

The city of Lincoln has found a need to establish a comprehensive omnibus station to accommodate the large number of services that run between the city and the surrounding countryside, and the land to the west of the churchyard is designated for this purpose in the town map prepared under the Town and Country Planning Act, 1947. The land is owned by the appellant company who plan to lay it out with island platforms, but with a continuous pavement 8 feet in width along the eastern boundary. The oblong projection of the churchyard constitutes an obstacle.

---

[1] Open Spaces Act, 1887, s. 4: "In the Disused Burial Grounds "Act, 1884, . . . the expression "'burial ground' shall have the "same meaning as in the Metropolitan Open Spaces Act, 1881, as "amended by this Act, and the "expression 'disused burial ground' "shall mean any burial ground "which is no longer used for interments, whether or not such ground "shall have been partially or wholly "closed for burials under the provisions of any Statute or Order in "Council, and the expression 'build-"'ing' shall include any temporary "or movable building."

[2] Open Spaces Act, 1906, s. 20 (part): "The expression 'burial "'ground' includes any churchyard, "cemetery or other ground, whether "consecrated or not, which has been "at any time set apart for the "purpose of interment."

For the comfort and convenience of their customers and staff the company wishes to cover the station and proposes that the oblong projection shall be covered in a particular manner to which I shall refer later.

Although the company's project is a unified scheme in that they would be unlikely to leave part of the station uncovered, the issue before me appears to me, as it appeared to the learned chancellor, to fall into two parts. Can, and if so, should this area of consecrated ground be used as part of an omnibus station? If so, is the proposed roofing permissible?

As to the first of these issues I see no reason to differ from the learned chancellor. Until the decision of this court in *In re the Parish of Bideford*[3] there was considerable doubt and some apparent conflict of authority whether it could be permitted that land once consecrated to a sacred use should be used for a secular purpose. This case is clear authority that when the purpose for which the ground was originally consecrated can no longer be lawfully carried out the use of it for a secular purpose may be authorized though the ownership of the land remains unaffected.

The *Bideford* case[3] was one in which the wall of a churchyard was moved, part of the area of the churchyard being thrown into the highway. But the earlier case of *St. Gabriel, Fenchurch Street (Rector, etc.)* v. *City of London Real Property Co. Ltd.*[4] shows that the principle is not limited to the widening of a highway: the Court of Arches in that case protected and treated as valid a faculty permitting the construction and fencing of a private pathway to be used only by a commercial concern in common with the rector and churchwardens.

Mr. Ellison suggested that the use asked for was of a character inconsistent with the established concept of an easement in the nature of a right of way. It is not necessary, in my view, so to particularize. In the *St. Gabriel's* case[4] Lord Penzance found it unnecessary to define the exact nature of the right of user which may be authorized, and in my judgment the principle is fully stated by Sir Lewis Dibdin as Dean of the Arches in *Corke* v. *Rainger*[5] when he said: "having regard to "the case of *In re the Parish of Bideford*,[6] decided in this court "by my learned predecessor, Sir Arthur Charles, it must be taken "that the Ordinary has jurisdiction by faculty to allow a disused "churchyard, which has been closed for burials, to be used for "a secular purpose."

---

[3] [1900] P. 314; 16 T.L.R. 540.

[4] [1896] P. 95.

In a later case, that of *St. Nicholas Acons* v. *London County Council*,[7] the same judge, referring to the *Bideford* case,[8] suggested that "it is perhaps worthy of consideration whether it is "applicable to cases where questions of convenience of access to "the church or churchyard are not involved." In my judgment there is no such limitation to be added as a rider to the principle as stated in *Corke* v. *Rainger*.[9] I cannot see that any question of convenience of access to a church or churchyard arose in the *St. Gabriel's* case,[10] and consider that the matter is one for judicial discretion once it is established that the land is land which may be used for some secular purpose. The question is whether permission to rebuild the churchyard wall in the new position and to use the land outside the wall as part of an omnibus station is, on the terms proposed, in the interest of the public, including the parishioners. I find, as the learned chancellor found, that the petitioners successfully establish this part of their case, including their proposal that the land should be included in the area occupied by the 8-foot-wide pavement. Such a pavement would usually, if not invariably, be incidental to the extension of a highway over part of a disused churchyard and has never, so far as I am aware, been questioned in such a case.

By the statute of 1884, to which I have already referred, it is provided that "It shall not be lawful to erect any buildings "upon any disused burial ground" except for purposes irrelevant to this case. It is conceded by the petitioners that the land in question is part of a disused burial ground. The statute is closely linked with others providing for the maintenance of open spaces for the benefit of the public and I have been referred, in particular, to the speech of Lord Halsbury L.C. in *Paddington Borough Council* v. *Attorney-General*[11]—a case where a disused burial ground was being administered by the local authority as an open space.

---

[5] [1912] P. 69, 74; 28 T.L.R. 130.

[6] [1900] P. 314.

[7] [1928] P. 102, 113; [1928] A.C. 469; 44 T.L.R. 656.

[8] [1900] P. 314.

[9] [1912] P. 69.

[10] [1896] P. 95.

[11] [1906] A.C. 1, 3; 22 T.L.R. 55.

It is, however, to the language of section 3 of the Act of 1884 that I am bound to pay particular regard, together with the reported cases in some of which a proposed structure has been held to be within the prohibition and in others of which it has been permitted. In the *St. Nicholas Acons* case [12] the Privy Council held without hesitation that the building of a subterranean transformer chamber was prohibited; in *Bermondsey Borough Council* v. *Mortimer* [13] Chancellor Hansell took the same view as to the building of urinals. On the other hand, in *St. Botolph, Aldersgate Without*,[14] Chancellor Tristram authorized the construction of an arcade or covered way on the inner side of a churchyard wall, and the House of Lords in the *Paddington* case [15] held that a screen erected to prevent the acquisition of rights of light over a churchyard was not a building.

No case cited to me is, in my judgment, at all closely analogous to that now before me, and in my judgment it is necessary to specify with precision what is proposed and then to ask whether, if carried out, a building will have been erected on or upon the land in question.

The company's scheme for roofing their proposed station is for a structure covering a considerable area. Taken as a whole I have no doubt that it is a building. It is clear, however, that in designing the building the architect had in mind the prohibition expressed in the Act of 1884. By the use of modern engineering methods he has so designed such part of the roof as would cover the land now in question that it is supported entirely from the company's own land. At its eastern extremity it is proposed to hang a vertical glazed panel in approximately the same plane as the new churchyard wall, but nowhere in contact with it nor with the ground.

It was urged for the petitioners that by this somewhat ingenious design they had found a means of avoiding the difficulties placed in their way by the statute: and that the *St. Botolph's* case [16] in particular was authority for the contention that the roofing over of space does not necessarily constitute building upon it. I cannot, however, regard the *St. Botolph's* case,[16] in which the arcade remained within the churchyard and was ancillary to an embellishment of the churchyard wall, as affording any guidance for the decision of the present appeal.

---

[12] [1928] A.C. 469.

[13] [1926] P. 87.

[14] [1900] P. 69.

[15] [1906] A.C. 1.

[16] [1900] P. 69.

1956

St. Mark's Church, Lincoln, *In re.*

Willink, Dean of Arches.

It is with regret that I find myself unable to allow what is sought by the petitioners.

It would be artificial to rely on the fact that the words "on" and "upon" usually imply contact: the clear intention of the Act of 1884 is to prohibit all building in churchyards other than such building as is expressly permitted. Moreover, I agree with the learned chancellor that it is not possible or in accord with common sense to isolate one portion of the roof on the western side of the proposed building. The proposed building would appear to be and would in fact be a building erected partly upon the company's land and partly upon consecrated land, and it is clear to me that there is no jurisdiction in this court to permit the use of a disused burial ground for the accommodation of such a building.

For these reasons I find myself in agreement with the learned chancellor and obliged to dismiss the appeal with costs.

Appeal dismissed.
Cause to be retained in Court of Arches.
Faculty limited to adaptation and use of part of churchyard as a footpath, but not extending to the erection or suspension of any covering over that part.

Solicitor: *M. H. B. Gilmour.*

1956
Jan. 16, 17.

Lord Merriman P. and Wallington J.

WATERS *v.* WATERS.

Husband and Wife — Cruelty — Intention to injure — Boorishness, uncleanliness and taciturnity—Intention of being cruel or of driving spouse away—Presumption of intention.

Husband and Wife—Desertion—Constructive desertion—Inference from conduct—Boorishness.

If a reasonable man would know—if the particular husband must know—that a continuance in the course of conduct complained of would have an injurious effect on his wife's mental health, such conduct will in the absence of rebutting evidence amount to mental cruelty, just as an intention (even though it conflict with his desire) to drive the wife out will be found where the conduct of the husband towards his wife was such that a reasonable man would know—that the husband must have known—that in all probability it would result in her departure from the home.

A wife's case of persistent cruelty and constructive desertion before a court of summary jurisdiction was a complaint of extreme boorishness on the part of her husband, of unbearable taciturnity, of a deliberate refusal to co-operate over the running of the home and finance, and of personal uncleanliness of a very marked character persisted in in spite of the wife's protests to the extent that it became, in effect, nauseating. There was a complete indifference to her health, which was affected, and to her protests against the adverse effect upon her of his conduct.

The justices found that the parties were ill-suited to each other, that the husband had had no intention of being cruel, that his silence was due to his natural disposition, and that the deterioration in the wife's health had not been due to wilful misconduct on his part. They found further that the husband had not deliberately conducted himself so as to drive the wife away or bring consortium to an end; and upon that basis dismissed the wife's complaints without calling upon the husband to give evidence:—

Held, (1) that the justices had misdirected themselves, for it was not sufficient to dismiss the matter by saying that the husband had had no intention of being cruel. His conduct would be just as reprehensible if he could be said at least to have been unwarrantably indifferent as to the consequences to the victim.

(2) That the justices had further misdirected themselves in finding that there had been no desertion because there had been no proof of wilful ill-treatment and he had not deliberately conducted himself so as to drive the wife away.

(3) That since it would be open to the justices to find upon the wife's evidence both cruelty and desertion, the complaints must be referred back to the justices for a rehearing by a fresh panel.

Jamieson v. *Jamieson* [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875; *Lang* v. *Lang* [1955] A.C. 402; [1954] 3 All E.R. 571 applied.

APPEAL by the wife from the dismissal by the Newbury justices on October 14, 1955, of her complaints of persistent cruelty and (constructive) desertion.

The parties, both of whom were aged some 52 years and had been married before, were married in September, 1953. In her evidence the wife said that the husband had treated her "very "nicely" before they were married, and she found £1,500 to pay off his mother-in-law so that they could have a cottage, with a smallholding, as a matrimonial home. From the day of the marriage (which according to her evidence was never consummated) the husband's conduct changed, and she complained in her evidence of his extreme boorishness, unbearable taciturnity, deliberate refusal to co-operate in the running of the house, the finance, the smallholding, etc., and of personal uncleanliness of a very marked character, persisted in, in spite of protests on her part, to the extent that it became, in effect, nauseating. He was completely indifferent to her own state of health, and her protests of the effect of his conduct upon her; and when she had an accident in a pony-cart which she was driving, he treated her with indifference and later offensively and falsely suggested that the accident had been due to drink.

As a result of his conduct her health was affected and she left home in November, 1954. In July, 1955, she visited the home; but although she was hot and tired, the husband refused to let her rest in the house, refused to discuss matters, and left her.

The facts are considered more fully in the judgment.

At the close of the wife's evidence a submission was made of no case to answer, and the submission was upheld.

The justices in their reasons stated:

"1. That the husband and wife were ill suited to each other "owing to the wife's superior intelligence and the husband's "mode of life, particularly in matters of cleanliness.

"2. That the wife immediately after the marriage realized "that the marriage was a ghastly mistake by reason of his habits, "lack of intelligence and physical condition (a disease affecting "both legs).

"3. That the husband had no intention of being cruel to his "wife but, owing to his limited intelligence and set habits, was "not able to conform to the standards of life which his wife "expected or provide the companionship which she desired.

"4. That there had been no violent quarrels between the "parties and that the husband's silence was due to his natural "disposition.

"5. That having considered carefully the evidence of Dr. "Morland, the wife's mental health showed some deterioration "after the marriage due to various causes, particularly the "physical troubles to which she was subjected and her disappointment on finding her husband to be an unsuitable companion, but there was no wilful misconduct by the husband "which caused such deterioration.

"6. That there was no proof of wilful ill-treatment of the "wife by the husband and that he had not deliberately conducted "himself so as to drive the wife away from the house or bring "the matrimonial consortium to an end (*Buchler* v. *Buchler*[1]).

"7. For these reasons the justices decided that neither of "the two grounds of complaint had been proved."

---

[1] [1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319.

The wife appealed upon the grounds that the justices were wrong in law in holding that the evidence adduced on her behalf failed to disclose a prima facie case of persistent cruelty and of desertion, and that their decision was against the weight of the evidence.

Francis Barnes for the appellant wife. The justices misdirected themselves in suggesting that there must be " wilful " misconduct and an intention of being cruel, or of driving the other spouse away, before a finding of cruelty or desertion can be made. Although intention may be an important element in certain cases, as stated in *Jamieson* v. *Jamieson*,[2] that case is authority for the proposition that intention is not essential: see also *Lang* v. *Lang*.[3] It is also clear from *Jamieson* v. *Jamieson*[4] that in considering whether or not cruelty has been established the whole circumstances of the marriage must be taken into account.

There are several factors in the wife's case to be considered: the fact that the husband never consummated the marriage, his unclean personal habits, his moroseness, his indifference to the wife's feelings at times of crisis, such as when she had her accident, and his conduct in July, 1955, when she visited the home after some months of separation. Moroseness and silences may amount to cruelty [*Lauder* v. *Lauder*[5] and *Simpson* v. *Simpson*[6] were referred to]; and although *Bartholomew* v. *Bartholomew*[7] is against a finding in favour of the wife based upon the husband's unclean personal habits, that decision may no longer, it is submitted, be binding in view of *Lang* v. *Lang*[8]: see observations of this court in *Marjoram* v. *Marjoram*.[9]

In view of the course taken at the hearing, and of certain of the findings, it is submitted that the proper course would be to send the case back for a rehearing.

John Wood for the respondent husband. Although there is no specific finding in the justices' reasons that they disbelieved the complainant's evidence, it is submitted that this is implicit in their reasons when they are considered in conjunction with the evidence.

In view of *Lang* v. *Lang*,[10] to which the justices were not referred, it must be conceded that they misdirected themselves upon the issue of constructive desertion. But although intention may not be essential in cases of cruelty, it is nevertheless a most important factor—see, for example, *Timmins* v. *Timmins* [11]; and there are some cases, such as where the trouble stems from a natural reserve, or a bookishness, in which a lack of intention may preclude a finding of cruelty. The justices would not be wrong in law if upon the particular facts of this case they had merely stressed the element of intention.

---

[2] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

[3] [1955] A.C. 402; [1954] 3 All E.R. 571.

[4] [1952] A.C. 525.

[5] [1949] P. 277; [1949] 1 All E.R. 76.

[6] [1951] P. 320; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955.

[7] [1952] W.N. 535; [1952] 2 T.L.R. 934; [1952] 2 All E.R. 1035.

[8] [1955] A.C. 402.

[9] [1955] 1 W.L.R. 520.

[10] [1955] A.C. 402.

[Reference was also made to *Buchler* v. *Buchler* [12]; *Jamieson* v. *Jamieson* [13]; *King* v. *King* [14]; *Horton* v. *Horton* [15]; *Squire* v. *Squire* [16]; *Pike* v. *Pike*.[17]]

LORD MERRIMAN P. This is a wife's appeal from the dismissal by the justices for the Newbury Petty Sessional Division, on October 14, 1955, of her complaints of persistent cruelty and of desertion. It is, I think, in the first instance essential to determine what it is that the justices have actually done, and to make the point clear I must state one or two facts.

The parties were married in September, 1953, and, so far as this case is concerned, for all practical purposes the marriage came to an end when, in November, 1954, the wife left the matrimonial home, and it was that parting which was said to have the quality of desertion, inasmuch as the wife said that she had, in effect, been expelled from the matrimonial home by her husband's conduct. To that bare outline I must add the fact that it is evident that both spouses, who were over 50 at the time, had been married before. That appears, in the case of the husband, from the fact that a lady who is described as his mother-in-law had advanced money on the cottage and smallholding which was to become the matrimonial home. In the case of the wife, she had certainly two daughters, one of whom was a witness in the case, and the other, I gather, is a married woman living not very far away.

From the dates which I have mentioned it is plain that the parties never actually cohabitated after the wife left the matrimonial home in November, 1954. The summons in the case was taken out on September 5, 1955, from which it follows that the alleged cruelty must, if not in whole, at least in part, have occurred within the six months preceding the summons in order to give the justices jurisdiction to deal with it. I have no doubt that it was that circumstance which prompted what otherwise would appear to be rather a curious submission, made as a matter of law, before any evidence had been given at all, viz., that the justices had no jurisdiction to deal with the case on the basis that so far as the cruelty was concerned it was assumed (contrary, as I think, to the facts) that there could not be any evidence which could bring the course of conduct alleged against the husband in part at least within the statutory six months. That, of course, on the other hand, would not apply to the alleged desertion, for, if the parting had the quality of desertion on the part of the husband, that would be assumed to be a continuous offence; and it is well settled that the statutory six months does not apply in that case. However, that was the submission, and the justices, as I think very wisely, said "We "will hear the case and see what it is all about before we make "any ruling of that sort," and the wife's evidence was taken.

---

[11] [1953] 1 W.L.R. 757, 760; [1953] 2 All E.R. 187.

[12] [1947] P. 25.

[13] [1952] A.C. 525.

[14] [1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584.

[15] [1940] P. 187; 56 T.L.R. 883; [1940] 3 All E.R. 380.

[16] [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51.

[17] [1954] P. 81n.; [1953] 1 All E.R. 232.

She was supported on the mental health element of the case (for it was a case of what is now conveniently called "mental "cruelty") by the evidence of her doctor, and both on the health element and on some of the facts which she alleged, by one of her daughters.

We have a very full and careful note of the evidence, and at the conclusion of the wife's case, although it is not clear whether any fresh submission of no case was made or not, cases were cited, *Lauder* v. *Lauder*[1] on the one side, and *Timmins* v. *Timmins*[2] on the other, and in the end the justices decided to dismiss both charges. By that time I think the submission that there was no jurisdiction had disappeared, because evidence had been given of an incident which occurred in July, 1955, which I should think was impossible to dissever from the rest of the case which the wife was making against her husband, and which to my mind, and, I think, to the mind of the justices, since no more was heard of that particular submission, disposed of the idea that there could not be jurisdiction, for the reason to which I have referred. I will come back to that particular incident later, because it is one to which I think some importance must be attached.

There remains, however, the question whether, having heard all this evidence, they dismissed the case because they did not think that there was anything in it, did not accept the wife's story, and thought it was making a storm in a teacup, or whether they dismissed the case on the ground that though they did not uphold the point as regards jurisdiction, they did uphold the point that there was no case to answer.

---

[1] [1949] P. 277.

[2] [1953] 1 W.L.R. 757.

Now I shall have to deal, with a little more particularity, with the reasons which the justices gave; but I cannot see any sign from first to last that they rejected the wife's evidence, that they thought that she was not telling them the truth, or anything of that sort. On the contrary, I think that their reasons assume that she was telling the truth, but that as a matter of law neither the charge of cruelty nor the charge of desertion was made out.

Before going further I wish to say, as I have said several times before (and I think the last instance was *Ramsden* v. *Ramsden*,[3] if I remember correctly), that I have no doubt whatever that justices have a perfect right, like any other tribunal, to throw a case out if they think that there is nothing in it, without waiting to hear the other side. But I repeat the caution which I have coupled with that on previous occasions, that, generally speaking, particularly in cruelty cases, it is not a very wise thing for justices to do; and I do not limit that only to justices, because, after all, it has been repeatedly emphasized by higher authority that the whole story in these matters is all important, particularly in cases which may be described, as, indeed, this case has been described by counsel for the husband, whose argument was, I think, very clear and helpful, as a border-line case. In all such cases it is very important to get the whole atmosphere from both sides.

However that may be, I have no doubt whatever that if that is what they did, it would not be right for us to interfere. If, after having seen the wife and her witnesses, they came to the conclusion that there was nothing in her story at all, I should not feel justified in saying that they ought to have taken another view. But I am proposing to deal with this case on the basis that what happened was that they ruled that there was no case to answer, though not on the ground of lack of jurisdiction which had originally been propounded. On that basis, and particularly in a border-line case, as I think this is, and as it has been fairly described by the husband's own counsel, it is of the essence of the matter that, assuming the wife's story, as one must assume it to be, to be more or less true in substance and in fact, the justices should direct themselves properly as to the issue before they rule that there is no case.

---

[3] [1954] 1 W.L.R. 1105; [1954] 2 All E.R. 623.

From the very first Mr. Barnes, for the wife, has said that he is not asking us to decide this matter, but is only asking that it should be sent back for a rehearing with a proper direction from this court as to the points to which the justices ought to direct themselves. As I take the view that that is the right result in this case, it is very desirable that I should not say anything which would seem to suggest a concluded opinion upon this, that or the other fact, and I must not be taken to be expressing any opinion, when I refer to the case which the wife put forward, as to its veracity or otherwise; but I am assuming, for the purposes of the ruling of "no case," that in substance her case is taken at its face value.

In a word, it is a case of extreme boorishness, of, as she says, unbearable taciturnity, deliberate refusal to co-operate over the running of the house, the finance, the smallholding, and so on, and personal uncleanliness of a very marked character, persisted in in spite of protests on her part to the extent that it became, in effect, nauseating: on the other hand, complete indifference to her own state of health, to her own protests that what was happening was, if I may use a colloquial phrase, getting her down, callous neglect of her when she had an accident while driving the pony-cart and was in hospital, and on her return home indifference at first, making no welcome of her or anything of that sort, and then, when he finally went to see her in her bedroom, making a most opprobrious and offensive remark which suggested that the accident was due to her having taken too much to drink, for which, I gather, it is not suggested that there was any foundation at all. The result of all this was that she was heading, so she says, for a nervous breakdown, and to some extent she was supported by the doctor, though, of course, he was not in a position to say what was the cause, though he did say that certain other complaints from which she suffered were not and could not be the whole ground of her mental condition.

She left home on November 17, 1954, and put her case as it stood at that time into a note which she left behind, in which she said that she had told him many times how she felt and that he did nothing to help her, and so forth, and complained of the various matters to which I have alluded; and she ended in this way: "My absence may make you alter towards me and "be more what I expected when I married you." Now, one of the things which is said in this case is that the husband's conduct was due to his natural disposition, which, I suppose, was a reflection of a remark made in *Horton* v. *Horton*,[4] about conduct being a manifestation of character acting in its own sphere. It was an excuse which was put forward, but did not succeed, in *Lauder* v. *Lauder*,[5] and a long way further back than that, in the leading case of *Kelly* v. *Kelly*,[6] which was the first reported case depending solely upon mental cruelty, where the excuse was put even higher, namely, that the conduct was due to the clerical husband's response to the call of a Higher Authority, and actuated, so it was said, by the best possible motives. Nevertheless, it was an excuse which did not prevail.

I said that I must refer to a later incident, because I think it is of very great importance in considering the whole history of this case. Having been away for about eight months the wife visited the matrimonial home to try to see the husband and have a talk about things. That was in July, 1955. But before I deal with it I ought to have mentioned one other circumstance of importance. I read the last sentence of the wife's letter about what she expected when she married this man. After all, as I have already pointed out, they were both people with previous experience of marriage, they had known each other for the best part of a year before they married, they had been seeing each other regularly, and her description of him was, in one word, that she found him a pleasant suitor. She says: "During the "time I met him until the time we were married I found him "to be very nice, lonely as I was. He appeared to be rather "unhappy. . . . He was owing his mother-in-law money on the "house. He treated me very nicely before we were married. "He was perfectly clean and quite normal." In other words, he could be nice if he chose; and it is a very remarkable thing that the wife's complaints of the change in this man's behaviour actually began with the very first day of the marriage. I mentioned the fact that he owed his mother-in-law money on the house. One of the things which he asked the wife to do before marriage was to save the house, "Roundwood Cottage," and if she could save it, they would live there, and the wife found £1,500 to pay off the husband's mother-in-law, with the result that the cottage and the smallholding became the matrimonial home. But she says that from the very day of the marriage the whole situation changed. Although they had no sexual intercourse at all, according to her story, he spent the first three days in bed because he liked being in bed, and he would not get up. She had no experience of farming herself, and although a sow had a litter the very first day, he would not go and help, despite the fact that she begged him to do so. There was another one a day or two later, and the same thing happened; he made her do all these things without offering the slightest help; and naturally enough, according to her case, it worried her very considerably, because it was so remarkable a change from the man he had been before marriage, so much so, indeed, that she accused him of having married her simply to get the £1,500, and that is one of the points which may have to be considered, and considered in light of the later incident to which I am about to refer. I am not expressing any opinion about it, but it is certainly one of the things which ought to be considered as a possibility in connexion with this husband's conduct towards her.

---

[4] [1940] P. 187, 193.

[5] [1949] P. 277.

[6] (1869) L.R. 2 P. & M. 31; (1870) L.R. 2 P. & M. 59 (C.A.).

With that preface she came, as I say, in July, 1955, to try to have a talk with her husband, according to her case, to see if things could not be got onto a better footing. The lock on the front door had been changed. That she found when she arrived first at the house. I presume that there had been an appointment, but however that may be, he arrived shortly afterwards on his bicycle. She had had to walk a mile and a half or thereabouts from the 'bus on a hot July day, and would have to walk back again. There was no 'bus for an hour and a half or so, and she asked, not unnaturally, to be allowed to go into the house; but he refused to allow her in at all and said that there was not a chair for her to sit on because she had taken them all, which was quite untrue. According to her she had taken what things belonged to her, but she had not denuded the house of furniture, and, indeed, he was living in it. However, in the most crude and callous way, according to her, he refused to let her into the house, and refused even to discuss matters. He picked up a sickle and went off to cut grass and left her there, with a remark to this effect, pointing to the key: "I have won," or "I have "come out on top." I do not know what precisely he meant, but it is certainly one of the things, one would have thought, that any court would want explained, because, of course, one possible interpretation is that he had got everything he wanted: he had got the house, to save which she had paid £1,500, he was not going to have her in it, and he had got her out of it. That is one possible thing that he meant. I do not say it is the meaning, but it is a possibility, and nobody can, I think, regard that incident as entirely separable from that which is alleged to have gone before, or, taking it as part of the story, can ignore the significant light that it throws upon the husband's attitude during this comparatively short time that they were living together.

That brings me to the justices' reasons. In finding the complaint not proved and dismissing the application, to quote their own words, they say "The husband and wife were ill-suited "to each other owing to the wife's superior intelligence and the "husband's mode of life, particularly in matters of cleanliness. "The wife immediately after the marriage realized that the "marriage was a ghastly mistake by reason of his habits, lack "of intelligence and physical condition (a disease affecting both "legs)." I have not mentioned the disease. It is one of the things on which the wife lays some stress, but it is impossible to know precisely what it was that was complained of; she merely talked about it as some horrible disease of the legs. The point really, as I think, is that she begged him to be treated for it, and he simply refused. In that sense it is more or less in the same category as his personal uncleanliness, which, according to her, consisted of such things as washing, in spite of the fact that there was a bath in the house, in the kitchen sink, cutting his toe-nails while the dinner was being put on the table in the room, and that sort of thing, and absolutely declining ever to have a bath. To put it quite plainly, she says, and so does the daughter, that whereas he was quite nice and clean before marriage, his aroma was nauseating.

I do not think, except for those introductory observations by the justices (it is perfectly true that she did lay stress on the lack of cleanliness and on this disease, and it is perfectly true that she did say that she realized the marriage was a ghastly mistake), that it was only his habits or lack of intelligence which caused her to say that; I think it was, as she puts it, the whole treatment to which she was being subjected.

Then there comes the first of three corresponding statements about the justices' approach to the matter, and it is here that I think one has to consider whether they have not misled themselves by that approach. They say "The husband had no "intention of being cruel to his wife, but owing to his limited "intelligence and set habits was not able to conform to the "standards of life which his wife expected or provide the companionship which she desired." That, I think, may be said, on the evidence as it stands, to do less than justice to the point

I have already mentioned, the contrast between the husband's behaviour before marriage and his alleged behaviour after marriage. However that may be (and I will come back to it again), that is all put to illustrate the fact that the husband is said to have had no intention of being cruel.

Then there is the passage to which I have already referred, that " There had been no violent quarrels between the parties, " and the husband's silence was due to his natural disposition," about which I will not repeat myself.

They then deal with the medical aspect of the matter:— " That having considered carefully the evidence of Dr. Morland, " the wife's mental health showed some deterioration after the " marriage, due to various causes, particularly the physical " troubles to which she was subjected, and her disappointment " on finding her husband to be an unsuitable companion, but " there was no wilful misconduct by the husband which caused " such deterioration."

Then finally, " that there was no proof of wilful ill-treatment " of the wife by the husband, and that he had not deliberately " conducted himself so as to drive the wife away from the house " or bring the matrimonial consortium to an end "; and there they refer to *Buchler* v. *Buchler*.[7] They say " For these reasons " the justices decided that neither of the two grounds of complaint " had been proved."

Now, I am not going to attempt the task, which I think would be difficult, if not impossible, of reconciling all the recent cases in the Court of Appeal on these topics, or of reconciling some of them with some of the older cases. I propose to deal with this matter by reference solely to decisions of the House of Lords, or of members of the House of Lords sitting in the Privy Council. I will begin with the statement that the husband had no intention of being cruel. The importance, in certain cases, of intention to injure, was dealt with in *Jamieson* v. *Jamieson*,[8] and the way in which it was dealt with there is not the less important because, in what was acknowledged to be a thin case of alleged cruelty, the case had not been allowed to go to proof. It was a Scottish case. Admittedly, as I say, the averments were very near the line, but what was held to be decisive in that case was that all the averments—(and it was emphasized over and over again that the whole thing must be taken together, that one must not deal with this allegation and that allegation and say that neither of them could possibly amount to cruelty;

---

[7] [1947] P. 25.

[8] [1952] A.C. 525.

one had to take the whole story, and to take it having regard to the character and susceptibilities of the parties, and so forth)—the whole of the alleged misconduct, was conditioned by the intention of the husband to bend the wife to his will; that was the decisive averment; and I think it is important to see how the matter was put, and I will take what Lord Normand said first. He said [9]: "The Lord President, I think, reaches the crux of "the case when he says that 'where the cruelty is of the type "'conveniently described as "mental cruelty," the guilty spouse "'must either intend to hurt the victim or at least be unwarrantably indifferent to the consequences to the victim.'" Lord Normand continued: "I do not propose to go into that "because I wish to avoid the discussion of hypothetical cases "and because I am of opinion that actual intention to hurt may "have in a doubtful case a decisive importance, and that such "an intention has been averred here. Actual intention to hurt "is a circumstance of peculiar importance because conduct which "is intended to hurt strikes with a sharper edge than conduct "which is the consequence of mere obtuseness or indifference. "My noble and learned friends have discussed the averments in "the opinions which they will deliver and which I have had the "advantage of reading, and they have shown that the appellant "has averred a case of actual intention to hurt, wilfully persisted in after the injury to the appellant's health was apparent "to the respondent. These averments are, in my opinion, "relevant and they are, I think, supported by sufficient specific "instances of the respondent's alleged cruelty. I therefore agree "that the action should go to proof."

Now, that is a very long way from saying that actual intention is necessary to a charge of cruelty, even to a charge of mental cruelty, for although he found that actual intention was alleged, as, indeed, did all the other Lords who sat on the case, as Lord Normand said, he approved what the late Lord President had said, that the guilty spouse in a mental cruelty case must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim.

Then, to avoid repetition, I will just call attention to the fact that Lord Normand went on to say that [10] "it does not do justice "to the averments to take up each alleged incident one by one "and hold that it is trivial or that it is not hurtful or cruel and "then to say that cumulatively they do not amount to anything "grave, weighty or serious. The relationship of marriage is not

---

[9] [1952] A.C. 525, 535.

[10] Ibid.

"just the sum of a number of incidents, and in this case it has "been overlooked that all the incidents averred are said to have "been inspired by the respondent's intention to impose his will "upon his wife without consideration of her feelings or health."

I will not refer to my own opinion beyond saying that I called particular attention to the leading case of *Kelly* v. *Kelly*[11] and pointed out[12] that Lord Penzance in the full court had said of the husband[13] "He says that he does not desire to injure her, "and it has never been asserted that he does." Nevertheless, they all held that what is now called mental cruelty had been proved. Generally speaking, I took what may be called the *Squire* v. *Squire*[14] line. I refer to it by that description for a particular reason, and I ventured to requote[15] a phrase of my own in *Simpson* v. *Simpson*,[16] which, as will appear shortly, has had the meed of approval of the Privy Council in *Lang* v. *Lang*.[17]

But it is right to say that Lord Reid, dealing with the *Squire* v. *Squire*[18] line of authority, said this[19]: "What I have said is "only intended to apply when a deliberate intention such as I "have described was the cause of the defender's conduct. Such "an intention need not be proved by direct evidence; it may be "inferred from the whole facts and atmosphere disclosed by the "proof. I do not doubt that there are many cases where cruelty "can be established without it being necessary to be satisfied by "evidence that the defender had such an intention, but I do not "intend to decide anything about such cases. If the defender "did not in fact intend to ill-treat the pursuer, I desire to reserve "my opinion whether, or to what extent, it is necessary or proper "to impute an intention which did not exist by invoking a legal "presumption that everyone must be supposed to intend or "foresee the natural and probable consequences of his acts, and "I also wish to reserve my opinion on the question whether or "in what circumstances it can be enough in such cases to prove "that a series of comparatively minor incidents has caused injury "to the health of the pursuer if the defender was not guilty of "deliberately ill-treating the pursuer."

Now, Lord Reid made a similar reservation in *King* v. *King*,[20] but he was also a party to the decision in *Lang* v. *Lang*,[21] to which I shall refer presently.

[11] L.R. 2 P. & M. 31, 59.
[12] [1952] A.C. 525, 540.
[13] L.R. 2 P. & M. 59, 72.
[14] [1949] P. 51.
[15] [1952] A.C. 525, 541.
[16] [1951] P. 320.
[17] [1955] A.C. 402.
[18] [1949] P. 51.
[19] [1952] A.C. 525, 549.
[20] [1953] A.C. 124, 140.
[21] [1955] A.C. 402.

But before I cite *Lang* v. *Lang*[21] I should like to refer to what Lord Tucker said in his short opinion in *Jamieson* v. *Jamieson*.[22] After pointing out that judges have, and the wisdom of judges having, always refrained from attempting a comprehensive definition of cruelty, he says: "It is in my view equally "undesirable—if not impossible—by judicial pronouncement to "create certain categories of acts or conduct as having or lacking "the nature or quality which render them capable or incapable "in all circumstances of amounting to cruelty in cases where no "physical violence is averred." And then he goes on: "Every "such act must be judged in relation to its attendant circum- "stances, and the physical or mental condition or susceptibilities "of the innocent spouse, the intention of the offending spouse "and the offender's knowledge of the actual or probable effect of "his conduct on the other's health (to borrow from the language "of Lord Keith[23]) are all matters which may be decisive in "determining on which side of the line a particular act or course "of conduct lies." Then he said later[24]: "In the present "instance I think that the averments of knowledge, intention "and persistence remove this case from the area of doubt in "which it might otherwise have lain in the absence of such "averments."

I do not think it is necessary to multiply citations on the point which Lord Tucker expressed, so clearly, that every act must be judged in relation to its attendant circumstances, and the rest. The same thing, or words to the same effect, will be found in Lord Reid's speech in *King* v. *King*,[25] where, after analysing the report in the Sessions Cases in the appeal of *Thomas* v. *Thomas*,[26] which, as he pointed out, was only partially reported in the Law Reports,[27] he says[28]: "What was said by the majority in *Thomas* "v. *Thomas*[29] may not be novel though it may make necessary "a re-examination of the reasoning in *Squire* v. *Squire*[30]"— (that is on the question of intending the natural consequences of a man's acts). "But it does, in my opinion, show that it is not "right first to ask whether the respondent's conduct was cruel "in fact and then to ask whether it can in any way be justified. "The question whether the respondent treated her husband with "cruelty is a single question only to be answered after all the

---

[21] [1955] A.C. 402.

[22] [1952] A.C. 525, 550.

[23] 1951 S.C. 286, 300.

[24] [1952] A.C. 525, 551.

[25] [1953] A.C. 124, 138.

[26] 1947 S.C. (H.L.) 45.

[27] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582.

[28] [1953] A.C. 124, 140.

[29] 1947 S.C. (H.L.) 45.

[30] [1949] P. 51.

"facts have been taken into account"; and then, on that basis, he examined the details of the particular case. One of the dicta in *Thomas* v. *Thomas*[31] to which he had alluded[32] was an observation of Lord Simonds, who said[33]: "there is in them"—(that is, in what the learned judge had said)—"the clear recognition, "which I find elsewhere in the judgment of the Lord Ordinary, "of the fact that the picture of the domestic lives of this man "and woman must be surveyed as a whole, before a true judg- "ment can be formed of their possible future relations."

Well, as I say, it is not necessary to multiply citations to that effect, but on these authorities I suggest to those who have to rehear this case that it is not sufficient, and that the justices misdirected themselves in thinking that it was sufficient, to dismiss the matter by saying that the husband had no intention of being cruel. His conduct is just as reprehensible, be it remembered, if he can be said at least to have been unwarrantably indifferent as to the consequences to the wife.

I do not think it necessary to refer further to reason No. 5. No doubt, as in most of these cases, the doctor had done his best to get from the wife herself her own view of what was causing the trouble, but it was not his business to say what *was* the cause. What he did say, and it is important, is that these other matters to which the justices refer under the head of "various "causes" were not in themselves sufficient to account for the mental condition in which he found the wife, and that plainly leaves it open to the inference that the wife is right in saying that it was the domestic trouble which was at the root of the matter.

That brings me to the last reason, and here my task is simpler, because Mr. Wood, in the course of his admirable argument, admitted that as a direction on the topic of constructive desertion this direction would not hold water, where they say "there was "no proof of wilful ill-treatment of the wife by the husband and "that he had not deliberately conducted himself so as to drive the "wife away from the house or bring the matrimonial consortium "to an end."

As this court has already said in *Marjoram* v. *Marjoram*,[34] authority on the topic of what is the proper approach to expulsive intention in a case of constructive desertion is to be found in the decision of the Privy Council in the Australian case of *Lang* v.

---

[31] 1947 S.C. (H.L.) 45.

[32] [1953] A.C. 124, 139.

[33] 1947 S.C. (H.L.) 45, 61.

[34] [1955] 1 W.L.R. 520; [1955] 2 All E.R. 1.

Lang.[35] After a review of what Denning L.J. (quoting from one of the judgments[36]) called two rival schools of thought about being taken to intend the probable consequences of a man's own act, they say—(I am not going to read the whole of the next two pages, which contain the root of the matter)—"Prima facie, a "man who treats his wife with gross brutality may be presumed "to intend the consequences of his acts. Such an inference may "indeed be rebutted, but if the only evidence is of continuous "cruelty and no rebutting evidence is given, the natural and "almost inevitable inference is that the husband intended to "drive out the wife. The court is at least entitled and, indeed, "driven to such an inference unless convincing evidence to the "contrary is adduced. In their Lordships' opinion this is the "proper approach to the problem, and it must therefore be determined whether the natural inference has been rebutted in the "present case." I may, perhaps, be permitted to say that on the preceding page a passage from my judgment in *Simpson* v. *Simpson*[37] in which I said "I venture to suggest that in this "jurisdiction, at any rate, we may continue to use the time-"honoured maxim" (i.e., a man must be taken to intend the natural consequences of his acts) "provided always that we "remember that it does not express an irrebuttable presumption "of law and that it is only to be applied in connexion with con-"duct which can fairly be described as ill-treatment," is quoted with apparent approval. Then, after drawing the distinction between intention and desire, which I need not read for the moment, the judgment continues[38]: "What, then, is the legal "result where an intention to bring about a particular result "(be it proved directly or by inference from conduct) co-exists "with a desire that that result should not ensue? That is the "substantial point raised by this appeal. The issue may be put "more concretely. What legal inference is to be drawn where "the whole of a husband's conduct is such that a reasonable man "would know—that the particular husband must know—that in "all human probability it will result in the departure of the wife "from the matrimonial home? Apart from rebutting evidence "this, in their Lordships' opinion, is sufficient proof of an inten-"tion to disrupt the home: but suppose, further, the husband's "hope is that in some way his actions will not produce these "natural consequences, that the wife will stay and that the home

---

[35] [1955] A.C. 402, 428.

[36] *Hosegood* v. *Hosegood* (1950) 66 T.L.R. (Pt. 1) 735.

[37] [1951] P. 320, 333.

[38] [1955] A.C. 402, 429.

"will not be disrupted. Where a man's own actions are concerned and not their effect on another, the answer is easy. If "he desires to resist temptation but yields to it his intention is "evidenced by his acts. His better self is, it may be, overborne, "yet in the end his intention is to yield. Where, however, the "effect of his actions upon other people is concerned and there "is no certainty but only a high degree of probability as to what "the result will be, is a court to say that if he did entertain "an unjustified hope that his wife would stay, the intention "normally to be inferred from his acts is rebutted, and is the "correct conclusion that he did not intend to drive her out? In "their Lordships' opinion no such conclusion is justified. If "the husband knows the probable result of his acts and persists "in them, in spite of warning that the wife will be compelled "to leave the home, and indeed, as in the present case, has "expressed an intention of continuing his conduct and never "indicated any intention of amendment, that is enough however "passionately he may desire or request that she should remain. "His intention is to act as he did, whatever the consequences, "though he may hope and desire that they will not produce their "probable effect." Then I need only quote one more short paragraph: "To say that it is not enough unless he knows that "separation must inevitably result from his actions is to ask too "much. Men's actions and judgments are not founded upon "certainty—in most cases certainty is unascertainable—but on "probabilities. No doubt a high degree of probability is required, "but no more."

Now that, in my opinion, plainly shows that in saying that there was no proof of wilful ill-treatment of the wife by the husband, and that he had not deliberately conducted himself so as to drive the wife away from the home, and making that the test, the justices have misdirected themselves, and on any view of this matter I think that this case must go back on the issue of desertion. But although these observations were directed to cases of constructive desertion I know of no reason why precisely the same considerations should not be applied to mental cruelty. If a reasonable man (if I may paraphrase) would know—and this husband did know—that continuance in the course of conduct complained of would have an injurious effect on his wife's mental health, what more is necessary? In what way does that differ from the test which Lord Normand adopted in *Jamieson* v.

Jamieson,[39] that the spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim? It seems to me that essentially the two phrases convey the same idea, and I do not think that there is any reason here for distinguishing between the two charges which are made. Plainly, as I say, there is a misdirection, and, indeed, it is not disputed that there is a misdirection as regards constructive desertion. I think that it would be idle to send the one complaint back without the other, and that the two must be considered in light of the considerations which I have based upon recent decisions of the highest authorities.

For these reasons I think that this appeal succeeds, and that the order dismissing the wife's complaints must be set aside, and her complaints be referred back to be dealt with by a fresh panel of the justices for the petty sessional division.

WALLINGTON J. I agree entirely both in substance and in detail with the judgment which my Lord has just delivered, and if it were not that this is a case of some little difficulty and with some peculiarities, I would not attempt to add another word.

In my opinion it must be assumed for the purpose of this appeal that the justices did not disbelieve the evidence given on behalf of the wife. Their reasons seem to me to be consistent only with the inference that they believed that evidence.

If, without any misdirection as to the effect of the evidence, they had decided the case in the way in which they did decide it, this court could not disturb their decision, for it must always be remembered that this court is not, and the justices' court is, the court which alone has the duty and the jurisdiction to try the case. They took the somewhat drastic course of throwing out the case without calling upon the husband to answer it; in my opinion it is plain that they did so because they misdirected themselves as to the effect of the evidence.

The misdirection to which, in my view, their judgment was due, has been very fully dealt with by my Lord in his judgment; and all I desire to say about it is that in my opinion the justices regarded it as essential to the wife's case on cruelty that they should be satisfied that there had been a wilful and deliberate intention on the part of the husband to be cruel to his wife, and, as to the desertion, they apparently thought that the wife must prove a deliberate intention on the part of the husband so to act as to drive her away from the matrimonial home.

---

[39] [1952] A.C. 525, 535.

In my view that was erroneous. A man may be cruel to his wife, especially perhaps in mental cases, if he says to himself, and acts upon what he says, "Now I am going to be physically "and otherwise cruel to my wife. I will do this or that to "her, and I intend to hurt her"; or he may be cruel to his wife (especially, as I repeat, in mental cases), if he says to himself, and acts upon what he says, "I am going to live my own life in "my own way, whatever the consequences to my wife," and if day after day he does the kind of thing which he must know would have a serious effect upon her health—and in this case, upon the evidence, it may be said that the justices might have found that he knew, because there is evidence that the wife told him so—in either of these classes of acts, if proved with proof also of danger or reasonable apprehension of danger to the life, limb or health, bodily or mental, of the wife, a case of cruelty might, in my opinion, be made out.

It seems to me that on the evidence before the justices to which I have referred it would be open to them to find—and it is for them to decide whether they so find or not—that this man has brought himself within the second notion of matrimonial cruelty which I have indicated, and that his conduct exhibited throughout an unwarrantable indifference to any consequences that might ensue to his wife from the life which he was determined to live and to impose upon her. Further, it seems to me that the justices must have overlooked, or under-valued, the evidence of the wife as to the capacity of the husband before marriage to be "a very nice fellow," not only "a suitable "suitor" but "very nice in his manners and habits." This evidence, if believed, appears to me to be in conflict with their view expressed in their reasons that his conduct was "owing to his "limited intelligence and set habits" and his resultant inability "to conform to the standards of life which his wife expected, or "provide the companionship which she desired." He had done that before marriage. Why did he cease to do it after marriage? It may possibly be that, after marriage, he had got his house and that he liked the sort of life which he had been in the habit of living before the courtship, and that therefore he did not care what might happen to his wife in consequence of his so pleasing himself. He determined to do as he liked, although he knew—he had, on the evidence, more than sufficient intelligence to know—that that would have, as, indeed, on the doctor's evidence it may well have had, an element of danger and also a reasonable apprehension of danger to her physical or mental health, or both.

1956

WATERS v. WATERS.

If I am right in my opinion that the justices were wrong in the view which they took as to the requisites for an order in favour of the wife, then, in my opinion, this court is bound to send the case back to the justices as my Lord has indicated.

Appeal allowed; re-hearing ordered.

Solicitors: *Leader, Henderson & Leader for Gardner, Leader & Co., Newbury; Field, Roscoe & Co. for Brain & Brain, Reading.*

J. B. G.

1956
June 12, 13, 14, 15, 18, 19, 27.

Lord Merriman P.

TEMPLE BAR (OWNERS) v. GUILDFORD (OWNERS).
THE GUILDFORD.

[1954 T. No. 452.]

Shipping—Collision—Damages—Remoteness—Damaged vessel's refusal of offer to tow by other vessel—Subsequent sinking—Reasonableness of refusal—Burden of proof.

Damages—Remoteness of damage—Novus actus interveniens—Ship—Whether master's conduct reasonable—Onus of proof—Collision damage.

The plaintiffs' vessel, the *Temple Bar*, was in collision with the defendants' vessel, the *Guildford*, in fog off Whitby. The defendants' vessel, laden with a cargo of coal, was severely holed. After the collision the master of the plaintiffs' vessel, a large heavily laden single screw steamship, offered to tow the defendants' vessel, but the master of the defendants' vessel refused this offer, preferring to await the arrival of tug assistance for which he had already sent. The cargo on the defendants' vessel jammed in the hole caused by the collision and checked the inflow of water. Five hours after the collision, the *Guildford* was taken in tow by a tug with a view to beaching her in Tees Bay. After about two hours' towage, the coal started to dislodge and five hours later the *Guildford* sank, in a position about one mile distant from a place where she could have been beached in safety, and was subsequently abandoned as a total loss. Liability was apportioned in the proportions of one-quarter to the plaintiffs' vessel and three-quarters to the defendants'. On the question whether the loss of the *Guildford* was recoverable as a consequence of the collision:—

Held, that the onus of proving each and every head of damage was upon the claimant, and thus it was for the defendants to prove that the decision of their master to refuse the offer of towage was reasonable, and not for the plaintiffs to prove that such decision was unreasonable; and that the decision of the defendants' master was a reasonable and seamanlike decision, and therefore the final loss of the defendants' vessel was not the result of a novus actus interveniens but was a natural consequence of the collision.

The Paludina [1927] A.C. 16, affirming [1925] P. 40, *The City of Lincoln* (1889) 15 P.D. 15, and *The Oropesa* [1943] P. 32; 59 T.L.R. 103; [1943] 1 All E.R. 211, affirming [1942] P. 140 applied.

ACTION.

At about 12.35 a.m. on March 10, 1954, the plaintiffs' vessel, *Temple Bar*, collided in fog with the defendants' vessel, *Guildford*, in a position about 20 miles to the southward and eastward of the South Gare light, off Whitby.

At 12.50 a.m. an S O S was sent from the *Guildford* reporting the collision and requiring a tug to stand by, and later the *Temple Bar* was also requested to stand by. At 1.05 a.m. the master of the *Temple Bar* offered to tow the *Guildford*, but the master of the *Guildford* refused this offer, replying that he had already signalled for a tug. The *Guildford's* cargo of coal became jammed in the hole caused by the collision, checking the inflow of water. The chief engineer of the *Guildford* reported to the master that he did not want to move the engines for fear of the coal shifting. Various further requests for tug assistance were sent out, and at 5.28 a.m. the tug *Euston Cross* arrived and took the *Guildford* in tow. The *Temple Bar* then proceeded on her voyage. The *Guildford* was towed towards Tees Bay at a speed of about 2–3 knots, but from 7.30 a.m. the coal started to dislodge by reason of the movement of the vessel through the water. Up to that time and for half an hour afterwards, the ship's pumps had kept the situation under control in the engine room but not in No. 3 hold. From 8.24 to 9.44 a.m. towage was suspended, while the *Euston Cross* came alongside the *Guildford* and attempted to rig her pump, which proved inadequate. At 9.44 a.m. the tug *King's Cross* arrived and made fast. At 10.32 a.m. water was gaining in the engine room of the *Guildford* and at 11.33 a.m. the generators were cut off. The *Guildford* was beached one mile to the eastward of the South Gare light, about one mile from a place where she could have been beached in safety, taking the ground with her stern, while her fore end remained buoyant, and heeling over to starboard. At 12.45 she was abandoned. The *Guildford* was a total loss.

The plaintiffs claimed that the collision was solely caused by the improper and negligent navigation of those on board the *Guildford*. The defendants denied negligence and counterclaimed against the plaintiffs, alleging that the collision and subsequent sinking of the *Guildford* were solely caused by the improper and negligent navigation of those on board the *Temple Bar*. By their reply and defence to counterclaim, the plaintiffs alleged that the sinking of the *Guildford* was not directly caused by the collision. By their rejoinder, the defendants alleged that it would have been impracticable and dangerous for those on board the *Temple Bar* to attempt to tow the *Guildford*.

K. S. Carpmael Q.C. and *P. T. Bucknill* for the plaintiffs. On the question whether the loss of the defendants' vessel was a consequence of the collision, the onus is on the defendants to establish that such loss was a direct consequence of the collision. Frequently the consequential damage resulting from a collision is obvious, for instance, where a vessel strands or sinks shortly after a collision, but here the defendants must prove that the sinking was a direct consequence of the collision: *The Paludina*, *per* Lord Sumner[1] and *per* Bankes and Scrutton L.JJ.[2] To satisfy the court that there was a break in the chain of causation the plaintiffs only have to show that the action of the master of the defendants' vessel in refusing the offer of towage was a new and independent cause, and not that the refusal amounted to negligence: *The Paludina*, *per* Lord Sumner.[3] Since the defendants are themselves at fault, it cannot be said that their master was placed in a dilemma by reason of the plaintiffs' negligence: *The Paludina*, *per* Lord Phillimore.[4] The pleaded case of the defendants takes upon themselves the onus of proving that the loss of their vessel was a consequence of the collision, but the marine superintendent of the towage company, the chief engineer of the defendants' vessel, and the tug masters have not been called to discharge that onus and speak as to the towage and sinking. The decision in *The Metagama*[5] may be inconsistent with *The Paludina*[6] as to the question on whom the onus lies to prove a novus actus interveniens, but in the former case it is not clear from the report what the position was on the pleadings, liability for the collision having been admitted.

The courts are slow to hold that an innocent plaintiff is not entitled to recover his damage, but the position is different where the plaintiff is himself partly to blame. The dilemma doctrine is a matter of defence only. Once liability is established the plaintiff or counter-claimant must prove his damage. The onus of showing damage flowing from the negligence is upon the claimant putting forward his case. The question whether a party has been placed in a dilemma is only relevant when dealing with liability, and a wrongdoing party, it is submitted, cannot invoke the dilemma doctrine: *The Winona* [7] and *The Flying Fish*,[8] *per* Lord Chelmsford.

---

[1] [1927] A.C. 16, 26.

[2] [1925] P. 40, 43, 48.

[3] [1927] A.C. 16, 28.

[4] Ibid. 32.

[5] 1928 S.C.(H.L.) 21.

[6] [1927] A.C. 16.

[LORD MERRIMAN P. I am doubtful whether the onus matters here. Bearing in mind what was said by Lord Thankerton in *Watt* (*or Thomas*) v. *Thomas*,[9] and by Lord Dunedin in *Robins* v. *National Trust Co.*,[10] is not this a case where the question of onus is irrelevant because the court can come to a conclusion on the evidence?]

Often the consequential damage is apparent and is not in dispute, but a claimant will fail if he does not prove his case by showing damage flowing from the negligence. Allegations of negligence by the claimant after the collision may be set up by way of defence to a claim, as in *The Metagama*.[11] In that case all that was decided was that the allegations of negligence, raised by way of defence to the claim, were not established by the evidence. The law, as laid down in *The Paludina*,[12] remained unchanged and was applied in *The Oropesa*.[13]

[LORD MERRIMAN P. In *The Oropesa* [13] a party four-fifths to blame was able to invoke the dilemma doctrine?]

In that case the liability of the ship was being determined and the master was not held personally to blame. Onus of proof is relevant here since this is a case where the court has not got all the evidence before it: *Watt* (*or Thomas*) v. *Thomas*, *per* Lord Thankerton,[14] and *Robins* v. *National Trust Co.*, *per* Lord Dunedin.[15] The court lacks certain evidence on which to come to a definite conclusion on the matter and should not take advice from the assessors when there is an insufficiency of evidence.

Waldo Porges Q.C. and *Derek H. Hene* for the defendants. Prima facie, this is a case where the sinking of the vessel was caused by the collision. There is a direct chain of causation from the very serious collision damage to the sinking. The defendants rely on *The Oropesa* [16] and *The Bharatkhand*.[17] For the chain of causation to be broken the plaintiffs must satisfy the court that the vessel would be more likely to have been safely beached by towage from their vessel than a tug, and that it was unreasonable of the defendants' master to refuse the offer of towage. It is submitted that reasonable human conduct does not break the chain of causation: *The Oropesa.*[18]

---

[7] (1943) 77 Ll.L.Rep. 156, 160.
[8] (1865) Br. & Lush. 436, 443.
[9] [1947] A.C. 484, 487.
[10] [1927] A.C. 515, 520.
[11] 1928 S.C.(H.L.) 21.
[12] [1927] A.C. 16.
[13] [1942] P. 140; [1943] P. 32.
[14] [1947] A.C. 484, 487.
[15] [1927] A.C. 515, 520.
[16] [1942] P. 140; [1943] P. 32.
[17] [1952] 1 Lloyd's Rep. 470.

There are two distinct issues, one as to liability and the other as to the consequential damage; the latter is entirely separate from the former. Langton J. in *The Genua*[19] and Willmer J. in *The Bharatkhand*[20] regarded the two questions as entirely separate. Langton J. in *The Genua*[21] clearly regarded the onus as being on the party alleging a break in the chain of causation, and in *The Oropesa*[22] Lord Wright did not specifically mention onus of proof. Only if it is shown that the decision of the master of the defendants' vessel to refuse the offer of towage was unreasonable is the chain of causation broken.

K. S. Carpmael Q.C. in reply. The onus of proving damage arising from an act of negligence is upon the claimant: *The Paludina, per* Lord Sumner,[23] and *The Waalstroom, per* Hill J.[24] A party may frame their case, as in *The Metagama,*[25] to take upon themselves the burden of proving an affirmative case of negligence after the collision; in that case the only question decided was whether allegations of negligence after the collision had been made out. The decision in *The Genua*[26] was based on the way the case in *The Metagama*[27] had been framed. It is conceded that the eventual success or failure of the action taken by the defendants' master is not the test. The test is whether in the master's action there was a new and independent cause intervening: *The Oropesa, per* Lord Wright.[28] Whichever party has to discharge the onus, it is for the defendants to supply all the evidence. Once liability has been established, the rule is the same for both parties in applying the test as to whether there was a break in the chain of causation. [*H.M.S. London*[29]; *The City of Lincoln*[30]; Marsden's Collisions at Sea, 10th ed., p. 112, and Winfield's Textbook of the Law of Tort, 5th ed., p. 426, were also referred to.]

Two nautical assessors sat with the judge.

Cur. adv. vult.

---

[18] [1942] P. 140; [1943] P. 32.
[19] (1936) 55 Ll.L.Rep. 139.
[20] [1952] 1 Lloyd's Rep. 470.
[21] 55 Ll.L.Rep. 139.
[22] [1943] P. 32.
[23] [1927] A.C. 16, 25.
[24] (1923) 17 Ll.L.Rep. 28, 53.
[25] 1928 S.C.(H.L.) 21.
[26] 55 Ll.L.Rep. 139.
[27] 1928 S.C.(H.L.) 21.
[28] [1943] P. 32, 39.
[29] [1914] P. 72.
[30] (1889) 15 P.D. 15.

June 27. LORD MERRIMAN P. reviewed the evidence relating to the collision and held the *Temple Bar* one-quarter and the *Guildford* three-quarters to blame. After referring to the evidence concerning the offer by the master of the *Temple Bar* to tow the *Guildford* after the collision, and the master of the *Guildford's* refusal of this offer, he continued: On these facts the argument, shortly stated, is put as follows:—The onus of proving each and every head of damage is upon the claimant. Five hours elapsed before any tug took the *Guildford* in tow, and another seven hours having elapsed before the ship was abandoned within a mile or less of safety, it is suggested that the refusal of the *Temple Bar's* offer to tow, made directly after the collision, was the real cause of the final loss. At the very least, it is suggested, the *Temple Bar* could have brought the *Guildford* much nearer to Tees Bay, so that tugs could have taken her in tow at a point closer to safety; and at any rate, that it is for the *Guildford* to prove that this method would not have been successful, and to put forward all the evidence upon which the matter could be determined. In particular it is complained that the intention to call the chief engineer of the *Guildford* having been announced, with the intimation that his evidence was likely to take some time, the *Guildford's* case was closed without his going into the witness-box. Thus it is suggested that the details about the jamming of the hole with coal, and the circumstances in which the coal subsequently failed to hold the water, remain unexplained. It is also complained that although the *Guildford* had leave to call the marine superintendent of the towage company, who was actually on board the *Guildford* for an unspecified period, or, failing him, the master of the first tug, the court was left without any evidence from any person qualified to give it, of the hazards of the actual towage carried out by the *Euston Cross* and the *King's Cross* respectively. Moreover, the chief officer, who was sent below to investigate the damage immediately after the collision, and who gave what the master described as a very adverse and serious report, must, it is suggested, have been in a position to amplify his signed statement and to throw some light on subsequent events.

I appreciate the force of these criticisms upon the gaps in the evidence about what actually happened, but am not convinced that they have much bearing on the question for my determination.

In my opinion *The Oropesa*,[1] amongst other cases, clearly establishes that the failure of the method actually adopted does not show that the decision to adopt that course was not reasonable. I doubt very much whether evidence about the incidents of the unsuccessful towage really throws much light on the reasonableness, or otherwise, of refusing the alternative method proffered.

---

[1] [1943] P. 32.

I agree with the argument that the burden of proof lies upon the *Guildford*. Without attempting to resolve a divergence of opinion in the House of Lords between certain observations about the onus in *The Metagama*[2] and in *The Paludina*,[3] I think it is evident that the majority in *The Paludina*[3] agreed with the way in which the onus was placed by Bankes and Atkin L.JJ.[4] in the Court of Appeal. The opening passage of Lord Sumner's opinion[5] makes this clear, and both Lord Carson and Lord Blanesburgh agreed with him. Moreover, Langton J. in *The Oropesa*,[6] said expressly that he approached the case from that point of view. In the Court of Appeal,[7] Lord Wright expressed his entire agreement with the way in which Langton J. had dealt with the case, though without particular reference to the question of the burden of proof. Thus, in my opinion, the question for decision is whether it is established that it was reasonable for the *Guildford* to refuse the offer of towage by the *Temple Bar*, and not whether the *Temple Bar* has proved that it was unreasonable for the *Guildford* to refuse.

That reasonableness or unreasonableness of the refusal is the test is, in my opinion, settled by the judgment of the Court of Appeal in *The Oropesa*.[8] Lord Wright said[9]: "Certain "well-known formulae are invoked, such as that the chain of "causation was broken and that there was a novus actus inter-"veniens. These phrases, sanctified as they are by standing "authority, only mean that there was not such a direct relation-"ship between the act of negligence and the injury that one can "be treated as flowing directly from the other."

Like Lord Haldane in *The Metagama*[10] he relied[11] upon the judgment of Lindley L.J. in *The City of Lincoln*,[12] who said "'I take it that reasonable human conduct'" (Lord Wright stressed that expression) "'is part of the ordinary course of "'things. So far as I can see my way to any definite proposition

---

[2] 1928 S.C.(H.L.) 21.
[3] [1927] A.C. 16.
[4] [1925] P. 40.
[5] [1927] A.C. 16, 25.
[6] [1942] P. 140, 144.
[7] [1943] P. 32, 40.
[8] [1943] P. 32.
[9] Ibid. 36.
[10] 1928 S.C.(H.L.) 21, 25.
[11] [1943] P. 32, 38.
[12] (1889) 15 P.D. 15, 18.

" ' I should say that the ordinary course of things does not exclude " ' all human conduct, but includes at least the reasonable conduct " ' of those who have sustained the damage, and who are seeking " ' to save further loss.' "

Again, referring to Lord Haldane's approval in *The Metagama* [13] of that passage from *The City of Lincoln*,[14] Lord Wright,[15] thought that Lord Haldane's words [16]: " ' if they do whatever " ' they do reasonably, although unsuccessfully, their mistaken " ' judgment may be a natural consequence for which the offending " ' ship is responsible,' " contained an important statement of principle.

Scott L.J. said [17] that he was satisfied that the action taken by the master to save the lives of those for whom he was responsible was reasonable, and that therefore there was no break in the chain of causation. The word " therefore " is the important word.

In my opinion those passages are directly in point here. The *Guildford* is asserting that her refusal of the towage was " the " reasonable conduct of those who have sustained the damage, " and who are seeking to save further loss." [18] The master gave as his reasons that the *Temple Bar* was a large ship, heavily laden; that he did not think it was practicable for her to come alongside and get a towrope; that there was a chance that a heavy ship like that approaching him in the fog would hit him pretty hard, and put his ship in a worse position. In cross-examination he said that he did not think the proffered towage was practicable. It had to be a careful towage, with ability to ease up when required, and he did not think the *Temple Bar* could have managed it. He added that a big heavy ship like the *Temple Bar* carries her way quite a distance even when the engines are stopped, much more so than a small ship or a tug would do. He did not agree that the fact that she was on the spot would have made it advisable to make the attempt. He agreed that his ship was lost about half a mile from where she could have been beached, referring presumably to the South Gare, but added that if the *Temple Bar* had taken him in tow he thought he would have sunk much sooner. He was afraid that any jerk on the towrope, or going too fast, would have dislodged the coal. I was favourably impressed by this evidence of the master. He struck me as being a credible witness.

---

[13] 1928 S.C.(H.L.) 21, 25.

[14] 15 P.D. 15, 18.

[15] [1943] P. 32, 40.

[16] 1928 S.C.(H.L.) 21, 25.

[17] [1943] P. 32, 41.

[18] 15 P.D. 15, 18.

Mr. Carpmael submitted that there was no evidence to support these opinions. When I intimated that the Elder Brethren were of the same opinion as the master of the *Guildford*, Mr. Carpmael argued that the court was not entitled to take the advice of the Elder Brethren when the state of things aboard the *Guildford* was deliberately left so vague. I do not agree with that view.

On the contrary, in *The Clan Lamont*,[19] a case which, like this, raised the question of the onus of proof in a matter of seamanship, Scott L.J. said[20]: "Of course, in arriving at that "conclusion—(namely, that there was no bad seamanship)—we "attach the greatest weight to the expert advice which has been "given to us by our assessors—and that advice, it should be "remembered, is expert evidence, admissible in Admiralty "Courts, on all issues of fact about seamanship."

The advice I have received is that in the difficult conditions created by the darkness and the fog, towage of a ship the size of the *Guildford* by a ship as large and as heavily laden as the *Temple Bar* should only be attempted as a last resort if no other method of towage is available. Having regard to the fog, I am advised that the operation would have been dangerous: first, in the approach to pass the towline; and secondly, if this could be achieved without damage, the towrope would have had to be as long as possible, communication would have been difficult in that state of visibility, and the clumsiness and lack of manoeuvrability of a vessel like the *Temple Bar*, in comparison with a tug, and the inability of the *Temple Bar* either to turn or to take her way off quickly, even at her slowest speed, might have caused instant disaster. In this connexion, I am advised that it is an important consideration that the *Temple Bar* is a single-screw steamship of only moderate power. Moreover, if it had become necessary to beach the *Guildford* while in tow of the *Temple Bar*, the operation would have been almost impossible since the *Temple Bar* was drawing about 10 feet more than the *Guildford*. In substance the Elder Brethren agree with the master.

In spite of the lapse of time between the decision to refuse the offer of the *Temple Bar* and the final disaster, it must be remembered that there was no change for the worse in the situation during the five hours before the *Euston Cross* arrived; if anything, the situation improved for the time being, owing to the jamming of the coal, and meanwhile the *Temple Bar* was in fact standing by. In my opinion the master's decision to await the tug was a reasonable and seamanlike decision.

---

[19] (1946) 79 Ll.L.Rep. 521.

[20] Ibid. 524.

That being my conclusion, the question of the onus of proof need not be further considered: see *per* Lord Dunedin in *Robins* v. *National Trust Co.*[21] and *Watt* (*or Thomas*) v. *Thomas*, *per* Lord Thankerton.[22] Accordingly, I hold that the *Guildford* is entitled to recover her proportion of the consequential damage.

Judgment for the plaintiffs for three-quarters of their claim and judgment for the defendants for one-quarter of their counterclaim.

Solicitors: *Hill, Dickinson & Co.; Botterell & Roche.*

A. S-R.

---

[21] [1927] A.C. 515, 520.

[22] [1947] A.C. 484, 487.

MOSS *v.* MOSS.

1955 *Dec.* 19.

Willmer J.

Legal Aid — Certificate — Discharge — Increase of disposable income — Reference to National Assistance Board—Finality of their decision —Powers of area committee—Court's power to discharge certificate —Failure to give information of changed circumstances—Reasonable time allowed—National Assistance Board's power to re-determine—Change of circumstances—Lapse of more than 12 *months from application for certificate—Legal Aid and Advice Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 15 (1)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *as amended by Legal Aid* (*General*) (*Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954, *No.* 166), *regs.* 8 (5), 11 (2A) (4)—*Legal Aid* (*Assessment of Resources*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1358), *regs.* 1 (2), 9 (2), *Sch. I, Part I, para.* 2 (1).

A wife who had been granted a civil aid certificate with a nil contribution on her application dated August 30, 1951, did not disclose, until cross-examination on October 22, 1952, in other proceedings (in which she was also an assisted person), that she had obtained a lucrative contract for six months' employment from October 6, 1952. This information was communicated by her solicitors on November 6, 1952, to the local committee, who were also independently informed by the husband's solicitor.

The matter was referred by the appropriate area committee to the National Assistance Board, who held that there should be no reassessment of disposable income, apparently on the basis that it was not competent for them to take into consideration any increase in earnings unless it had occurred within 12 months of the date of application for legal aid. The certificate for the proceedings of October 22, 1952, for which application had been made in April, 1952, was, however, discharged.

The area committee regarded themselves as bound by the determination of the Board, but gave further consideration to the matter when the Legal Aid (General) (Amendment No. 1) Regulations, 1954, provided them with increased powers to discharge certificates. They concluded, however, that although they had power under the new regulation 11 (2A) to discharge the certificate, it would not be proper in the circumstances (the contract had by then expired) to invoke it.

On December 20, 1954, the wife, by her counsel, consented to the dismissal of the proceedings, and the question of her liability for costs and the possible revocation of her certificate was raised on behalf of the husband:—

Held, (1) that in view of regulation 9 (2) of the Legal Aid (Assessment of Resources) Regulations, 1950, which provides that every decision or determination of the Board shall be final, the area committee had rightly decided that they could not interfere with the Board's decision upon the question of reassessment, and the court was equally precluded by the regulation from interfering in any way with that determination.

(2) That the court could not inquire into the decision reached in their discretion by the area committee not to discharge the certificate under regulation 11 (2A).

(3) That in view of the absence of any time limit imposed by regulation 8 (5) of the Legal Aid (General) Regulations, 1950, within which information as to a change of circumstances must be conveyed to the area committee, that time must be presumed to be one which is reasonable in all the circumstances; and the circumstances of the present case were not such as to justify a revocation of the certificate by the court under regulation 11 (4).

Per curiam. The view of the National Assistance Board that they had no power to redetermine the wife's means, as the change of circumstances had come after a lapse of more than 12 months from the date of her original application for a certificate, appeared to have been based upon a misinterpretation of the Legal Aid (Assessment of Resources) Regulations, 1950, First Schedule, Part I, paragraph 2 (1), and the definition of the "period of computation" in regulation 1 (2). The effect of information being supplied by an assisted person to the area committee as to an increase in means is the same as if it were an original application for a certificate and should call for the consideration of an entirely new period of computation.

APPLICATION AS TO COSTS.

A wife applied for a civil aid certificate on August 30, 1951, for the purpose of originating proceedings under section 23 of the

Matrimonial Causes Act, 1950, and was granted a certificate dated October 26, 1951. Her disposable income was assessed at less than £156 a year and her disposable capital at nil; her maximum contribution was fixed at nil. She already held a civil aid certificate in connexion with certain Chancery proceedings, in which her maximum contribution was fixed at £2, and successfully applied on April 12, 1952, for a certificate in connexion with proceedings under section 17 of the Married Women's Property Act, 1882.

The proceedings under section 23 came before Willmer J. on May 27, 1952, after an adjournment, when it was held, after oral evidence, that the wife had made out a prima facie case of wilful neglect to provide reasonable maintenance, and an order for costs was made in her favour up to that date. The matter was accordingly referred to the registrar for investigation as to the means of the parties, and an interim order was made against the husband at the rate of £500 a year less tax. There were considerable delays in the investigations arising from discovery, and the matter did not in fact come before the judge again until December 20, 1954.

On October 6, 1952, the wife began work on a contract for six months at the rate of £125 a month; up till then she had been practically speaking without work. Although the contract was terminated within the six months owing to her ill-health, she was in fact paid the full remuneration.

On October 22, 1952, the proceedings under the Married Women's Property Act, 1882, came before a master in the Queen's Bench Division. During the course of her evidence she disclosed for the first time, to the surprise of everyone present, including her own legal advisers, the fact that she had obtained employment. The husband's solicitors communicated the information to the local (legal aid) committee, and the wife's solicitors, on November 6, 1952, voluntarily and spontaneously wrote to that committee disclosing the new source of remuneration.

The matter was referred to the appropriate area committee, who submitted the facts to the National Assistance Board for a redetermination of the wife's disposable income in respect of all three certificates. The Board, for reasons considered in the judgment, took the view that only the determination relating to the certificate for the Married Women's Property Act, 1882, proceedings, which had been applied for within 12 months of the wife's change of circumstance, could be revised; and held that there was no ground for any reassessment of the wife's

1955

Moss
v.
Moss.

disposable income in the present proceedings and in the Chancery proceedings. The area committee considered themselves bound by the determination of the Board and took no action in relation to the earlier certificates. On November 16, 1954, the area committee considered whether they should discharge the certificate under their increased powers given by the new regulation 11 (2A), which came into force in April, 1954, under the Legal Aid (General) (Amendment No. 1) Regulations, 1954; but considered that in the circumstances by then existing it was not a proper case in which to take that action.

The wife's interim order was suspended on June 11, 1953; and on November 3, 1954, the registrar intimated in his report that both parties desired the matter to be referred back to Willmer J., and directed that the costs be costs in the inquiry. On December 20, 1954, the wife by her counsel consented after discussion to her originating summons being dismissed. The question of costs was adjourned for the assistance in argument of the Queen's Proctor, and to enable the area committee to have an opportunity of being heard.

Sir Harry Hylton-Foster Q.C., S.-G. and *J. R. Cumming-Bruce* for the Queen's Proctor. The decision of the area committee not to amend or discharge the certificate was based upon the view of the National Assistance Board that they had no power to redetermine the wife's means as more than 12 months had elapsed since the date of her original application for a certificate. The revision of an assessment is a matter for the Board, and the court has no jurisdiction to review or revoke the decision of an area committee which has been properly made.

[WILLMER J. The court, however, has power to revoke or discharge a certificate under regulation 11 (4) of the Legal Aid (General) Regulations, 1950.[1]]

---

[1] Legal Aid (General) Regulations, 1950, reg. 11 (4): "At any time "during the hearing of any proceedings to which an assisted person is "a party the court may, upon application by or on behalf of any other "party to the proceedings or by The "Law Society, consider whether the "assisted person—(*a*) has wilfully "failed to comply with any regulation "as to the information to be furnished "by him; or (*b*) in furnishing any "such information has knowingly "made a false statement or false "representation; and on any such "application the court may make an "order revoking the certificate or discharging it from such date as may "be appropriate and the court's decision shall be final: Provided that "no order shall be made under this "sub-paragraph until the assisted person has been given an opportunity "to show cause why the certificate "should not be discharged or, as the "case may be, revoked."

It is the duty of an assisted person under regulation 8 (5)[2] to inform the appropriate area committee of an alteration in his circumstances, and penalties are provided under section 15 of the Legal Aid and Advice Act, 1949,[3] if he fails to do so. On an application to amend, or on notice deemed to be an application to amend, given under regulation 8, the question of redetermination is referred by the area committee to the Board, whose decision is final. The area committee has since April, 1954, been given a discretionary power to revoke or discharge a certificate under the new regulation 11 (2A).[4] If application is made to the court to revoke a certificate under regulation 11 (4) it must be made on evidence.

[WILLMER J. It would appear that the information was in fact given by the wife.]

Joseph Jackson for the husband. The wife failed properly to comply with regulation 8 (5); and although it is conceded that the information was in due course furnished, that was only done following upon a chance admission made during cross-examination in other proceedings. Even then there was a delay; and it is submitted that her failure to inform the appropriate committee at the time when the change of circumstances took place was a wilful failure to comply with the regulations which justifies a revocation of her certificate under regulation 11 (4) (*a*). It is not necessary on an application for revocation under that regulation to prove that the assisted person has been guilty of a criminal offence under the Act.

---

[2] Regulation 8 (5): "Whenever the "circumstances upon which the Board "have determined the disposable in- "come or disposable capital of an "assisted person have altered so that "he has reason to believe that his dis- "posable income has increased by an "amount greater than £26 (amended "by S.I. 1954, No. 166 from £52) or "his disposable capital has increased "by an amount greater than seventy- "five pounds, he shall inform the "appropriate area committee of that "alteration in his circumstances, and "such notice shall be deemed to be "an application for an amendment of "his certificate."

[3] Legal Aid and Advice Act, 1949, s. 15 (1): "If any person seeking "or receiving legal aid or advice— "(*a*) wilfully fails to comply with any "regulations as to the information "to be furnished by him; or (*b*) in "furnishing any information required "by the regulations knowingly makes "any false statement or false repre- "sentation, he shall be liable on "summary conviction to a fine not "exceeding one hundred pounds or to "imprisonment for a term not exceed- "ing four months or to both."

[4] Legal Aid (General) Regulations, 1950, reg. 11 (2A): "The appropriate "area committee shall discharge a "certificate if—(*a*) as a result of a "further determination by the Board "under the provisions of regulation 8 "—(i) the disposable income of an "assisted person exceeds £420 a year; "or (ii) the disposable capital of an "assisted person exceeds £500 and the "probable costs which might reason- "ably be incurred by him in continu- "ing the proceedings, otherwise than "as an assisted person, would not "exceed the maximum contribution "payable under the determination; "(*b*) as a result of any information "coming to their knowledge they con- "sider that the assisted person no "longer has reasonable grounds for "taking, defending or being a party "to the proceedings or, as the case "may be, that it is unreasonable in "the particular circumstances for him "to continue to receive legal aid: "Provided that a certificate shall not "be discharged under this sub-para- "graph until the assisted person has "been given an opportunity to show "cause why the certificate should not "be discharged."

[WILLMER J. You are in effect inviting me to do what the area committee refused to do.]

H. S. Law for the wife. Regulation 8 (5) does not prescribe a specific time limit within which information of a change of circumstances must be disclosed. It is submitted that there must either have been an offence under section 15 of the Act, or nothing, and that regulation 11 (4) does not apply if there has not been such an offence. The delay here was only for a few weeks, and it was not culpable; the matter has been investigated by the area committee, and although the court has power under regulation 11 (4) in an appropriate case to revoke or discharge a certificate, whether there has been an investigation by the area committee or not, it is submitted that that action is not warranted on the facts in this case.

R. J. S. Harvey for the area committee. The committee referred the matter to the National Assistance Board, who found that there had been no change in the disposable income in respect of the section 23 certificate. The Board acts upon the Legal Aid (Assessment of Resources) Regulations, 1950. The rate of income upon which the assessment of contribution is based is determined according to paragraph 2 (1) of Part I of the First Schedule[5]; the period of computation is defined in regulation 1 (2).[6] The effect of the regulation and paragraph is that once the year of computation has expired no change in the disposable income of the assisted person can affect the civil aid certificate, and the question of a redetermination does not arise. The position is different, however, if there is an alteration in capital resources, to which the year of computation does not apply.

---

[5] Legal Aid (Assessment of Resources) Regulations, 1950, Sch. I, Part I, para. 2 (1): "The rate of "income of the person concerned from "any source shall be taken to be "the income which that person may "reasonably expect to receive (in cash "or in kind) during the period of "computation, that income in the "absence of other means of ascertaining it being taken to be the income "received during the preceding year."

[6] Legal Aid (Assessment of Resources) Regulations, 1950, reg. 1 (2): ". . . The 'period of computation' "means the period of 12 months next "ensuing from the date of the application for a certificate or such other "period of 12 months as in the particular circumstances of any case "the Board may consider to be "appropriate. . . ."

When the area committee received the information of the assisted person's altered circumstances they informed the National Assistance Board. Upon their decision, which is final—Legal Aid (Assessment of Resources) Regulations, 1950, reg. 9 (2)—that there should be no redetermination, the area committee had then no power in any event to take further action. The position was, however, reconsidered after the new regulation 11 (2A) had come into force, and it was decided in the committee's absolute discretion, after a consideration of the whole history, that the certificate ought not to be discharged under the provisions of that regulation.

Jackson in reply. The finality of the Board's decision so far as the area committee is concerned is accepted. But there was a duty to disclose the altered financial position under regulation 8 (5), and the real issue is whether the information would ever have been disclosed if it had not been given fortuitously under cross-examination. The question whether or no this was a case in which there might have been a prosecution is irrelevant. The Board were wrong in holding that they had no power to redetermine the wife's means.

[WILLMER J. But even if they were, their decision was nevertheless final.]

WILLMER J. The question which comes before me today, after a number of adjournments, is what order I ought to make in relation to costs incurred in respect of a wife's summons for maintenance under section 23 of the Matrimonial Causes Act, 1950.

The question arises because the wife, who in the event has been unsuccessful in her application, comes before the court as an assisted person. The civil aid certificate which is before the court states that her disposable income is less than £156 a year, and her maximum contribution has been fixed at nil. Doubt has been expressed whether, in all the circumstances, she is entitled to appear before the court as an assisted person, or whether, on the other hand, the certificate should be discharged. If, however, she is entitled to appear before the court as an assisted person, then I must determine whether she is under any liability in respect of the husband's costs and, if so, it becomes my duty to quantify the amount of costs that I think she should pay, and that, in turn, raises a question as to what may be her means.

The questions raised (and they were raised on the previous occasions to which I have already referred) were of such difficulty that I thought it right to ask for the assistance of the Queen's Proctor in discussing the effect of the Legal Aid (General) Regulations, 1950. The Queen's Proctor has instructed the Solicitor-General to appear before me, and I have had the benefit of a most lucid and helpful argument from him. I also thought it right to give the area committee an opportunity of being heard, having regard to the fact that not only were the Legal Aid Regulations to be discussed, but the decision taken by the area committee was a matter which was called in question. The area committee availed themselves of the opportunity I gave them, and I have also had the benefit of an extremely helpful argument from Mr. Harvey on their behalf.

[His Lordship referred to the history of the case, and dealing with the events of October, 1952, said:] In October, 1952, the wife, who had up to then been practically speaking without means, obtained work, and if I may say so, extremely lucrative work, in the shape of a contract for six months at the rate of £125 a month, that is to say at the rate of £1,500 a year. I am informed that she did not in fact work the whole of those six months, but had to give up, I think due to ill-health; I have been informed, however, that she was in fact paid the full amount of the remuneration due in respect of that six-months contract. It also happened that shortly after the wife obtained that employment a hearing of the Married Women's Property Act proceedings came on before a master in the Queen's Bench Division; and in the course of giving evidence during that inquiry the wife disclosed for the first time, and apparently to the surprise of everybody present, including her own legal advisers, the fact that she had obtained this lucrative employment. That, of course, affected a number of matters. It affected the question as to what maintenance, if any, the husband ought to pay under the proceedings current before me. It also affected the question of the wife's status as an assisted person. Not unnaturally, the husband's solicitors communicated the facts which had emerged during the wife's evidence to the local committee under the Legal Aid Scheme. Properly speaking, I suppose the communication should have been made to the area committee, but in due course their letter found its way to the right committee, and the area committee wrote to the wife's solicitors on November 7, 1952, asking them for their views on the matter. It appears that that letter crossed in the post with a letter from the wife's solicitors to the local committee, dated November 6, 1952, in which they themselves voluntarily and spontaneously disclosed to the committee this new source of remuneration for the wife. The matter having been referred to the area committee, it was dealt with by them at the time, that is to say in November, 1952, presumably on the basis that this was a case in which an assisted person had given information of an increased income under regulation 8 (5) of the Legal Aid (General) Regulations, 1950. In order to determine the matter, the area committee, as they were bound under the regulations to do, submitted the facts to the National Assistance Board for a redetermination of disposable income. I should like to place on record that not only the certificate in the present proceedings, but also the other two certificates, were brought in question; and in relation to all three certificates the matter was, quite properly, submitted by the area committee to the Board.

The Board appear to have taken the view that the last of the certificates to which I have referred, namely, that issued in pursuance of the application made on April 12, 1952, ought to be discharged; but that in the case of the two earlier ones, which include the certificate in respect of the present proceedings, there was no ground for any reassessment of the wife's disposable income. In those circumstances the area committee, regarding themselves as bound by the determination of the Board, took no action in relation to the certificate which refers to the present proceedings.

[His Lordship referred to the registrar's suspension of the interim order, and the eventual dismissal of the summons, and continued:] That got rid of the cause of action which was before the court; but it left over the question of costs. Counsel for the husband at that time invited me, having regard to the new information that had come to light about the wife's means, to reopen the whole question of costs, including the costs incurred on the previous hearings in 1952. He did not succeed in persuading me that I had the power in the circumstances to vary my previous order, so that the order as to costs which I made up to and including May 27, 1952, stood and has continued to stand.

The question still remains, until this moment, as to what should be done in relation to the not inconsiderable costs which have been incurred, and abortively incurred, since May 27, 1952, and I suppose that those costs will include the not inconsiderable costs of the hearing we have had today. The wife still comes before the court in these proceedings as an assisted person, the area committee having acted on the Board's determination and not having seen fit either to amend or discharge her certificate, in spite of the lucrative employment which she obtained in 1952 for a period of six months.

To complete the history I should, I think, refer to the fact that in the interim the Legal Aid (General) (Amendment No. 1) Regulations, 1954, had come into force, as a result of which a new sub-paragraph (2A) was introduced into regulation 11, giving the area committee increased powers to discharge a certificate. In particular, as from April 27, 1954, when this new regulation came into force, there is a direction given that they shall discharge a certificate if, " . . . as a result of any information "coming to their knowledge they consider that the assisted "person no longer has reasonable grounds for taking, defending "or being a party to proceedings or, as the case may be, that it is "unreasonable in the particular circumstances for him to con-"tinue to receive legal aid." The area committee met and considered the question whether, under the increased powers conferred by that regulation, they ought then to discharge the wife's certificate in respect of these proceedings. They came to the conclusion on November 16, 1954, that that new clause was sufficiently wide to give them power to discharge the certificate; but they went on to say that, as at the time when that power arose they had no evidence as to the wife's increased means, and had been informed that the contract under which she had been employed for six months at this lucrative salary had expired, they came to the conclusion that it was not proper to invoke this regulation for the purpose of discharging the wife's certificate. That was the position when the matter came before me on December 20, 1954, and it was in those circumstances that I thought it right, as I have said, to ask for the assistance of the Queen's Proctor, and also to give the area committee an opportunity of being heard.

The way in which the determination of the wife's means arose was as follows. As I have said, the area committee in 1952, when they became aware of the wife's increased means, referred the matter to the National Assistance Board for a redetermination of the wife's disposable income. The National Assistance Board apparently (though my knowledge as to their view comes only from secondhand information contained in a letter dated February 2, 1955, from the area committee) took the view that they had no power to redetermine the wife's means in this case, having regard to the fact that her change of circumstances came after a lapse of more than 12 months from the date of her original application for a certificate. To recapitulate the dates, the original application was made on August 30, 1951, and it was not until October 6, 1952, that the wife obtained this employment.

The view which the National Assistance Board held appears to have been based on their interpretation of paragraph 2 (1) of Part I of the First Schedule of the Legal Aid (Assessment of Resources) Regulations, 1950, read in conjunction with the definition clause in regulation 1 (2). The latter regulation contains the definition of the "period of computation," and defines it as being a "period of 12 months next ensuing from "the date of the application for a certificate or such other period "of 12 months as in the particular circumstances of any case "the Board may consider to be appropriate."

In considering paragraph 2 (1) of Part I of the First Schedule they appear to have come to the conclusion that it was not competent for them to take into consideration any increase in earnings on the part of the wife unless it occurred within that period of computation. It was in those circumstances, as I have already said, that they refused to deal with the reassessment of the wife's means in relation to the certificate in this case, and in relation to the previous certificate, though they did deal with the certificate in relation to subsequent proceedings, namely, the certificate in respect of which application was made on April 12, 1952; in that case, they took the view, apparently, that the increase in the wife's income did occur during the period of computation and, for that reason, called for a discharge of that certificate.

By regulation 9 (2) of the Legal Aid (Assessment of Resources) Regulations, 1950, it is prescribed that the determination of the National Assistance Board shall be final. In those circumstances the area committee took the view, and I think necessarily took the view, that as this determination had been arrived at by the National Assistance Board there was nothing they could do about it. I think that I am equally precluded by that regulation from interfering in any way with the determination by the National Assistance Board of the wife's disposable income. But, having said that I am precluded from interfering with it in any way, I think that it is only right to express my own view that the result arrived at by the National Assistance Board was based upon an interpretation of the material regulations which in my judgment will not bear examination; certainly, if it is a correct interpretation, it must lead to the most surprising and startling results. One can visualise all kinds of circumstances in which a person might properly become entitled to receive legal aid, but might, after a year has elapsed from the date of application, but whilst the proceedings are still dragging on, inherit a fortune, or obtain lucrative employment, or for one reason or another completely alter his or her financial circumstances. Yet if the interpretation of that regulation by the National Assistance Board be correct, such a change of circumstances would be entirely irrelevant for consideration. If that be right, I can only say that this case has brought to light a very serious gap in the regulations. But for my part I should have said that the argument on which the National Assistance Board appear to have acted is unsound. It seems to me that, reading the various regulations together, the effect of information being supplied by an assisted person to the area committee as to any increase of his or her means is the same as if it were an original application for a legal aid certificate; I should have thought, in accordance with the words of the definition clause of the Legal Aid (Assessment of Resources) Regulations, 1950, to which I have already referred, that it would call for the consideration of an entirely new period of computation, beginning from the date of the change of circumstances. That, however, was not the view which the National Assistance Board took, and, having expressed my own view, I can only reiterate what I have said before, namely, that I have no power to give effect to my view by saying that the National Assistance Board was wrong.

In those circumstances I have no power to sit in judgment on the decisions of the area committee, either their decision in 1952 or their decision in 1954 under the new regulation 11 (2A). The area committee have exercised their functions and discharged their duties under those regulations, and it is not for me to sit in judgment upon them. On the earlier occasion they merely gave effect, as they were bound to give effect, to the determination arrived at by the National Assistance Board. On the latter occasion, when they came to consider the new regulation 11 (2A), it was left to them to decide whether or not in the circumstances it was unreasonable for this wife to receive legal aid, and in their discretion they came to the conclusion that it was reasonable for her to receive legal aid; and that seems to me to be a decision which I cannot inquire into.

The only matter which I think remains alive today arises out of the application, made by Mr. Jackson on behalf of the husband, that I now should exercise the power which is undoubtedly conferred on the court under regulation 11 (4), which provides that "At any time during the hearing of any proceedings to which "an assisted person is a party the court may, upon application "by or on behalf of any other party to the proceedings or by The "Law Society, consider whether the assisted person—(*a*) has "wilfully failed to comply with any regulation as to the informa"tion to be furnished by him . . . and on any such application "the court may make an order revoking the certificate or dis"charging it from such date as may be appropriate and the "court's decision shall be final." That subsection is additional to the similar power which the area committee have under regulation 11 (3). Notwithstanding the fact that the area committee under regulation 11 (3)[1] has already given its verdict on this point, Mr. Jackson now invites me, not by way of appeal from the area committee, but exercising my own jurisdiction, to say that under regulation 11 (4) the wife's certificate ought to be discharged, on the ground that she has failed to comply with a regulation. The regulation with which she is said to have failed to comply is regulation 8 (5), which requires an assisted person, whose circumstances have altered so that he has reason to believe that his disposable income has increased by an amount greater than £26 a year, to inform the appropriate area committee of that alteration in his circumstances, and provides that if he does so inform the area committee the notice informing the area committee is deemed to be an application for an amendment of the certificate.

The argument on behalf of the husband is that, as soon as this wife obtained this lucrative employment, there was an imperative duty on her part to inform the area committee forthwith under that regulation; and having failed to do so she was in breach of that regulation, and therefore the court, under regulation 11 (4), has the power to consider whether her certificate should be discharged. It is an interesting speculation as to what the result would have been had the wife immediately written to the area committee. Presumably the area committee would have referred the matter to the National Assistance Board, as they subsequently did, and presumably the National Assistance Board would have arrived at the same determination as we know they later did, and in this case, no doubt, the decision of the area committee would have been the same. That, however, is not perhaps strictly relevant to the argument submitted by Mr. Jackson. Mr. Jackson's complaint is that, instead of the wife voluntarily and at once making a full disclosure of this change of circumstances to the area committee, she waited until October 22, 1952, when under cross-examination before the master she, almost accidentally, let fall the information that she had obtained this lucrative employment. He also pointed out that the first intimation about this which came to the area committee was that conveyed by the solicitors for the husband, and it was not until November 6, 1952, a month after the wife had started her new job, that there was any disclosure made on her behalf of this alteration in her means. In those circumstances it is said that, because of that delay of a month, this wife was in breach of the duty laid on her under regulation 8 (5), and that in those circumstances the court ought to discharge the certificate, notwithstanding the twice repeated refusal of the area committee to do so after full disclosure.

---

[1] Legal Aid (General) Regulations, 1950, reg. 11 (3): "Where the appro"priate area committee are satisfied "that an assisted person has wilfully "failed to comply with any regulation "as to the information to be furnished "by him, or, in furnishing any such "information has knowingly made a "false statement or false representa"tion, they may, if they think fit "—(*a*) where such omission or act "occurred prior to the issue of a "certificate, revoke the certificate; or "(*b*) where such omission or act oc"curred after the issue of the certi"ficate, discharge the certificate from "the date upon which such omission "or act occurred."

That argument, not unnaturally, was strenuously resisted by Mr. Law on behalf of the wife. It is not, I think, immaterial to point out that, if the conduct of the wife in failing to disclose this information for a period of one month amounted to such a breach of the regulations as would bring into play the court's powers to discharge the certificate, it could also amount, under section 15 (1) of the Legal Aid and Advice Act, 1949, to a criminal offence, for which the wife could receive substantial punishment. It is true, as Mr. Jackson pointed out, that that does not in any way affect the finding at which I ought to arrive. I merely point out that the finding at which I am invited to arrive on behalf of the husband is a finding of serious consequence, and one which might render the wife liable to criminal prosecution.

The point is a very fine one, and it turns on this delay of a month. It is suggested by Mr. Jackson that, if it had not been for the intervention of the proceedings before the master, the wife's increased means might very well have been concealed for a good deal longer, and perhaps might have been concealed for ever. It is suggested in those circumstances that the truth was revealed against the will of the wife, and did not come from her in any sense as a voluntary disclosure such as she was bound to make under regulation 8 (5). But the fact is that, whether forced or not, she did disclose it, and that seems to me to be a fact to which I have got to give effect. She did disclose it publicly on October 22, 1952, and I do not know why her legal advisers waited until November 6, 1952, before communicating with The Law Society. At any rate, the delay from October 22, 1952, to November 6, 1952, is not a delay which can be laid at the door of the wife personally. Any delay on the part of the wife herself, which could amount to such a breach of the regulations as would bring in the court's power to revoke the certificate, only relates, I think, to the period from the 6th to the 22nd October, 1952. Regulation 8 (5), to which I am now referring, says nothing as to the period within which information as to change of circumstances must be conveyed to the area committee. In the absence of any time limit imposed by the regulation I think I must conclude that the assisted person, under that regulation, must have a reasonable time in which to make the disclosure; and what is a reasonable time must necessarily of course depend on all the circumstances of the particular case. What is a reasonable time for individual A will not of necessity be a reasonable time for individual B; in other words, the individual circumstances of the particular person must, I think, be taken into account in determining what is a reasonable time.

I have therefore to consider whether there was a failure to disclose information within a reasonable time, so that I could say that there was a breach of regulation 8 (5) on the part of the wife. Having given that matter careful consideration, I am not in all the circumstances prepared to say that the wife did commit such a breach of that regulation as would bring into play the power of the court under regulation 11 (4). In those circumstances I think that the present application on the part of the husband for an order of the court to discharge the wife's certificate fails.

As to the previous decision of the area committee, arrived at on the strength of the findings of the National Assistance Board, I have, as already stated, come to the conclusion that I am quite powerless to intervene, or in any way to sit in judgment on the National Assistance Board's determination. In those circumstances it seems to me that the wife must necessarily continue to enjoy her status as an assisted person.

1955

Moss
v.
Moss.

Willmer J.

Having arrived at that conclusion I apprehend that I have now given myself an extremely difficult problem in dealing with the application for an order for costs against the wife in respect of the proceedings subsequent to May 27, 1952. On that I am prepared to hear argument, in which counsel for the area committee can join if he sees fit, as to how I should set about that problem.

[After discussion no order was made in regard to costs since May 27, 1952, other than legal aid taxation.]

Application refused

Solicitors: *Booth & Blackwell; M. A. Jacobs & Sons; The Treasury Solicitor; The Law Society.*

J. B. G.

1956
April 18.

Karminski J.

IN THE ESTATE OF YAHUDA, DECD.

Probate—Administration—Foreign law—Deceased with foreign domicile —Probate granted by court of domicile—English court follows court of domicile.

The established practice of the English courts is to admit to probate, without further evidence of its validity, a duly authenticated copy of a will which has been recognized by a court of competent jurisdiction in the country in which the testator was domiciled at the time of the death.

A testatrix died domiciled in the State of Connecticut in March, 1955, having disposed of her personal estate in the United Kingdom by a will dated November 12, 1953, and her property in Israel by a separate will of the same date. She subsequently disposed of property in other countries by two wills of November 19, 1953, and a codicil to one of them dated July 30, 1954. These later wills appeared to revoke those made on November 12, 1953. On March 21, 1955, the appropriate court in the State of Connecticut admitted the four wills and the codicil to probate:—

Held, that the will disposing of personal estate in the United Kingdom should be admitted to probate in this country.

PROBATE MOTION.

The relevant facts as set out in the case on motion were as follows: The testatrix died domiciled in the State of Connecticut on March 6, 1955. By two wills, both dated November 12, 1953, she disposed of personalty in the United Kingdom, and property in Israel, respectively. By a third will dated November 19, 1953, the testatrix disposed of her property in the Union of South Africa, and a fourth will of the same date related to her property in the United States of America. On July 30, 1954, she executed a codicil to the fourth will, the contents of which are irrelevant for the purpose of this report. As the two wills of November 19, 1953, contained revocation clauses they appeared to revoke those executed on November 12, 1953.

On March 21, 1955, the probate court for the district of New Haven in the State of Connecticut admitted all four wills and the codicil to probate.

The executors of the will of November 12, 1953, which disposed of property in the United Kingdom, applied by motion for a grant of probate of that will.

C. A. Marshall-Reynolds, for the executors, submitting that it was a well-established proposition of law that in making a grant of probate the English courts followed the courts of the domicile, referred to *Miller* v. *James* [1] and asked for a grant.

[KARMINSKI J. Is there no later authority?]

C. A. Marshall-Reynolds said that he had not been able to find one. *Enohin* v. *Wylie*,[2] which was to the same effect, was earlier in point of time. [Reference was also made to Mortimer on Probate, 2nd ed., pp. 477–478.]

KARMINSKI J. I think in this case that I should make the order asked for on the case on motion, because the court of the domicile, namely, the court of the State of Connecticut, has already granted probate on all four wills made by the deceased, although those made on November 19, 1953, would appear to revoke those executed on November 12, 1953. The principle laid down by the authorities cited makes the position clear, and I believe the law to be accurately stated in Mortimer on Probate, 2nd ed., pp. 28–30, 477–478, where it is said that, when a will has been recognized by the court which has jurisdiction in the country in which the testator was domiciled at the time of the death, it is the established practice of the English court to admit to probate in this country a duly authenticated copy of such will, without further evidence of its validity, as it is

---

[1] (1872) L.R. 3 P. & M. 4.

[2] (1862) 10 H.L.C. 1.

1956

In the Estate of Yahuda, decd.

Karminski J.

presumed that the foreign court has been satisfied on this point. The inconveniences of re-examining the validity of testamentary documents which have been pronounced valid by the court of the domicile appear to be obvious and have often been commented on in this court.

The applicants are entitled to the prayer in the motion, and I so order.

Solicitor: *R. K. M. Kenber.*

E. J.

1956
Feb. 15, 16, 17;
Mar. 9.

Sachs J.

INGRAM *v.* INGRAM.

Husband and Wife — Desertion — Constructive desertion — Wife's imprisonment on conviction for espionage in war.

Husband and Wife—Cruelty—Intention to injure—Inference of—Conviction for espionage in war.

Evidence—Conviction—Effect of proof of—Inference in matrimonial causes from fact of conviction.

Upon proof of a conviction in a matrimonial cause (unless the subject-matter of conviction is co-extensive with the matrimonial offence charged), the court is entitled as regards the conduct of the spouse convicted to draw such inferences as a reasonable man would normally draw, on becoming aware of the conviction against the background disclosed in evidence, and in particular such inferences as the other party to the marriage would normally draw. Where a marriage breaks down upon one spouse incurring a conviction it is open to a jury at least to draw the inference that the overt conduct of the convicted spouse has been such as to lead 12 reasonable men to consider him or her guilty.

Hollington v. *F. Hewthorn & Co.* [1943] K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35 distinguished.

The conviction of a spouse for treasonable conduct may amount to cruelty and constructive desertion.

Cooper v. *Cooper* (*No.* 1) [1955] P. 99; [1954] 3 All E.R. 415; *Ivens* v. *Ivens* [1955] P. 129; [1954] 2 All E.R. 446; *Crawford* v. *Crawford*, ante, p. 195; [1955] 3 All E.R. 592; *Waters* v. *Waters*, ante, p. 344; [1956] 1 All E.R. 432; *Lang* v. *Lang* [1955] A.C. 402; [1954] 3 All E.R. 571 applied.

A wife, who was found upon the evidence to have preferred Hitler to her husband and thereby to have caused the break-up of her marriage to a regular member of the Royal Air Force, was convicted, and sentenced in July, 1940, to a long term of penal servitude for espionage. The husband's health was seriously affected. Cohabitation was never resumed after her release in

1947, and she made it plain that she did not want to return. The husband petitioned for divorce upon the grounds of cruelty and desertion:—

Held, (1) that from the proof of conviction the inference might be drawn that the wife had been guilty of active and overt conduct of a treasonable type.

(2) That such conduct had, in the circumstances, amounted to both cruelty and constructive desertion.

(3) That upon the facts the wife had also been guilty of ordinary desertion.

(4) Even if the issues of cruelty and desertion were wrongly decided, this was eminently a case in which the wife's conduct had been such as to operate in diminution, even to the point of extinction, of any award of maintenance.

Per curiam. In considering whether a conviction constitutes cruelty in principle it does not matter if the conviction relates to a sexual, violent, fraudulent, or treasonable matter. The first questions in each case must be: does the single conviction, viewed against the background of the particular marriage, tend to strike at the roots of the matrimonial relationship, and has it inflicted injury on the health of the other party? If the single conviction is of the requisite degree of gravity and has the above effect, then the court can look at the circumstances as a whole and see whether or not there is to be inferred that intention to injure which leads to a finding of cruelty.

DEFENDED PETITION for divorce.

The following statement of facts is taken from the judgment: The parties in this case married in Cologne in 1922, the husband then being a serving soldier in the C.M.P. and the wife being a German subject. The following year they came to England and the husband transferred to the Royal Air Force where, for the next 25 years or so, he served under a regular engagement. There was a son born in 1923, who entered the Royal Navy in 1937. During the years prior to the outbreak of the 1939 War the parties had their permanent home in Portsmouth, though the husband's postings were in other parts of the United Kingdom, with the result that he mainly saw his wife when he was on leave. The marriage at that stage seemed to have been quite a happy one, subject only to some matters to which reference will be made later. The husband was given considerable praise by his wife as regards marital relations, and he was in fact a very kindly disposed man. He was not, however, a man either of quick intelligence or of firm determination—and was, indeed, woolly and indecisive in his general outlook on matters.

Within the home, too, the wife appeared to have had a good record. She was a woman who appeared to have been educated

1956

INGRAM
v.
INGRAM.

to a higher standard than the husband and to be of considerable intelligence: her character as shown in the witness-box had a quality far different from that of her husband—there was much of toughened steel about it and she was as firm and decisive as he was the opposite.

The court regarded the husband as a witness of truth, though on many matters his memory was found to be obviously weak: on the points upon which findings of fact were necessary, however, the court had no hesitation in accepting his evidence. The wife, on the other hand, was held to have shown a most unfortunate tendency to avoid giving either a direct or a frank answer on any point on which she thought her personal interests in this case were involved, and she was classed by the court as a completely unreliable witness in so far as there was any conflict as between her and her husband.

Already, before 1938, the wife was an ardent believer in the Nazi régime in Germany. In evidence she stated that her view then was (as indeed it remained at the date of the hearing) that the régime was doing great good in Germany and that she was an admirer of Hitler, whose photograph she placed on the inside of a cupboard door in the matrimonial home. It was also her belief that Nazism would be a good thing for England. When with her husband at home she used to adopt a highly insulting attitude to the Royal Family, and in addition she used to remain seated if in a cinema when the National Anthem was played—matters which caused the husband distress.

In 1938, the year of the Munich crisis, the wife became a member of the British Union of Fascists, a fact she concealed from her husband because, as she stated, she realized that it would hurt him to know. At that time, and indeed for some period previously, she had been on friendly terms with two men named Swift and Watts who were respectively the district leader of the Union and a member of the Union, and both of whom used to visit the home.

When war broke out she continued her membership of the Union, kept up the photograph of Hitler, continued to think that Nazism would be a good thing for England, and believed that Hitler would set up the leader of the British Union of Fascists, Sir Oswald Mosley, in control, as the latter alone would be prepared to co-operate with him.

The husband, whilst aware of the wife's general pro-Nazi views and of the fact that Hitler's photograph had not been taken down, had no knowledge at all at that time that his wife might be prepared to take any active step contrary to the interests of the country, and it was held to be typical of the husband's indecisive attitude that he did not cause the photograph of Hitler to be taken down, as he feared his wife's reaction.

In May, 1940, the German armies were sweeping into France, and it was towards the end of that month and in June that occurred the sequence of events which effectively broke up the marriage.

At this time the wife was first arrested and then put on trial at the Central Criminal Court in London on charges relating to her conduct that May. At the trial, which took place on June 28, 1940, and July 1 and 2, 1940,[1] the wife, Swift and Watts were tried on charges of, in effect, conspiring to aid the enemy and of doing certain acts to assist the enemy. The wife and Swift were found guilty on the conspiracy count, and the wife was also found guilty on two other counts. Swift was also found guilty on other counts: Watts was acquitted on all counts against him. Singleton J. thereupon sentenced the wife to two years' imprisonment on count one, the conspiracy count, and 10 years' penal servitude on count three, to run concurrently. It is to be noted that the sentence on Swift was likewise two years on count one and 14 years on a certain count seven.

The wife sought leave to appeal to the Court of Criminal Appeal both on conviction and sentence, but leave was refused.

The counts on which the wife was sentenced read:—

Count 1: "Conspiracy under Defence Regulation 2 (h) (1), "Defence Regulations, 1939: in that Marie Louise Augustina "Ingram, William Swift and Reginald Watts, on divers dates "between April 1, 1940, and May 23, 1940, conspired together "and with other persons unknown with intent to assist an enemy "by the prejudice of public safety, the Defence of the Realm or "the efficient prosecution of the War."

Count 3: "Assisting an enemy contrary to regulation 2 (a) "(1) of the Defence (General) Regulations, 1939: in that Marie "Louise Augustina Ingram, on May 20, 1940, with intent to "assist an enemy, committed an act likely to assist an enemy "or to prejudice the public safety, the Defence of the Realm or "the efficient prosecution of the War, namely, incited or "endeavoured to persuade Joseph Baron to obtain and communicate to her, the said Marie Louise Augustina Ingram, or to "William Swift, plans or information, to wit, blueprints or

---

[1] The Times, July 3, 1940.

"designs calculated directly or indirectly to be useful to an "enemy."

Count 5: "Inciting the commission of an offence under section 1 (1) (*c*) of the Official Secrets Act, 1911, and contrary to "the Official Secrets Act, 1920: in that Marie Louise Augustina "Ingram on May 20, 1940, incited or endeavoured to persuade "Joseph Baron to obtain and communicate to her, the said Marie "Louise Augustina Ingram or to William Swift, plans or information, to wit, blueprints or designs calculated to be directly or "indirectly useful to an enemy."

The husband who, as previously stated, had no idea of what the wife had been doing, stood loyally by her at trial and immediately afterwards, and indeed at the time found difficulty in believing that his wife could have been guilty. But the shock to him was a severe one in a number of ways. So far as the R.A.F. was concerned, impending promotion was held up, he was thoroughly interrogated on at any rate two separate occasions, and his life in the sergeants' mess became a very difficult one. From another angle the great shock, in his own words, "unhinged his nerves" when at one and the same time the bottom dropped out of his matrimonial life and everyone in the mess seemed to look at him when he came in. On more than one occasion whilst in the witness-box he referred to being in such a state that he did not know what he was doing and that the matter thus affected him for a period of years. That evidence was found to ring true and was accepted by the court.

In 1942 the husband was posted to India and remained there on active service till 1945. During that period he did not write to his wife. On his return to this country in the latter year he went back once more to live at his home town, Portsmouth. What had previously been the matrimonial home had been given up and the furniture dispersed amongst other members of his family. He himself went to live with a sister, and it is to be recorded that their mother had been killed in one of the air raids.

Having returned to England the husband on some three occasions visited the wife in prison, first at Aylesbury and then at Holloway.

Immediately before the first interview the husband's state of mind as regards the possibility of living together again with his wife when she came out of prison was undecided: he said he was prepared to live with her again at that stage—but his evidence on that point was given uncertainly and the true position was found to be that he was simply in a state of indecision and was waiting to find out what his wife, the decisive one of the two, would say.

On the first of his visits to prison it was common ground that the wife opened the conversation by mentioning how ill the husband looked: the wife's evidence, that he replied "Oh "yes, wouldn't you expect that—look what you did to me," was accepted. That interview was a short one and in it the wife, with characteristic decisiveness, told her husband that she did not want anything more to do with him—at the same time inquiring about the matrimonial furniture. That firm intimation that the marriage was at an end derived in part from her appreciation of how impossible it would be for her to go back to live with her husband in Portsmouth after the publicity of her trial and conviction, and in part from her almost fanatic determination to continue to assert her faith in Nazism: in a letter after either the second or third interview there occurred the phrase: "You are all so cowardly, everyone of you; no-one "has any pluck; I feel so sorry for all of you, but I do. I "will not change for any of you here."

After the wife had made her declaration as to the future the husband became on terms of close association with a woman whom he had met in 1940 or 1941; and in view of that statement of his wife he became prepared to set up home with this woman and to marry her when he was free to do so, and so informed his wife on a later visit to the prison. (The wife's version of events, which placed the husband's close association at an earlier date, and alleged an earlier statement to her about it, was rejected.)

At the last of the prison interviews there was some discussion between them on the matter of a divorce. Characteristically again the decision on this matter, too, appeared to have been left by the husband to the wife—and in particular the decision as to whether she herself should initiate some proceedings upon a footing which was not in evidence, or whether she should put in writing the determination which she had expressed orally in order that he, the husband, might take proceedings for his part. From the time of the last of the visits to his wife in prison, the husband had not seen her. When she was released she did not go to him in Portsmouth, nor did she ask to go to him: equally in the correspondence there was no invitation by the husband to her to come and set up a home with him. In fact, the correspondence degenerated into a series of requests by the husband as to what attitude she was going to take in relation to the divorce, coupled with replies from the wife showing a determination to do nothing until she had such safeguards as seemed sufficient to her for getting hold of what she regarded as her rightful share in the furniture, etc., of the old matrimonial home. This correspondence is considered in the judgment.

The present proceedings were commenced by the husband swearing an affidavit in support of the petition on March 26, 1954. Difficulties in finding the whereabouts of the wife led to the petition not being served till some time later. That petition, as originally framed, relied solely on the alleged desertion by the wife, referring in the particulars of desertion to the conviction, to the wife's statement on the first visit of the husband to her in prison in 1945, and to the fact that she did not return to him. The wife, by her answer, alleged that she was at all material times ready and willing to resume cohabitation with the husband and cross-charged him with desertion, relying on alleged statements by the husband to her on the occasion of one of the prison visits and of a letter of April, 1947, which she alleged had been written by the husband. The husband by his reply relied, inter alia, on the facts alleged to constitute constructive desertion as also constituting good cause for his not returning to his wife.

When the trial had been in progress for some time, it became clear that the husband's allegations were not set out in the pleading in a form which enabled all the potential issues between the parties to be satisfactorily considered. Counsel for the husband thereupon applied for leave to add the following new paragraphs:—

"5–A. That the respondent has since the celebration of the "marriage treated the petitioner with cruelty and that the "petitioner has thereby suffered injury to his health.

Particulars:—

"That on and after the outbreak of war in September, 1939, "the respondent caused the petitioner great distress by the "expression of her anti-British and pro-German sympathies. "She insisted, against the petitioner's wishes, on displaying "swastika flags and a photograph of Hitler in the home, and "on listening to pro-German and anti-British radio broadcasts.

"The petitioner, who had spent the whole of his adult life "in the service of Her Majesty's Forces, was at the date of "the respondent's said conviction for espionage, serving as a "sergeant in Her Majesty's Royal Air Force. By her espionage "activities and her subsequent conviction in the circumstances "aforesaid, the respondent caused the petitioner to be subjected "to much shame and humiliation among his fellow servicemen, "and the petitioner thereby suffered much mental anxiety, "distress and nervous strain."

"5–B. That in the further alternative, the petitioner will "contend that by reason of the respondent's conduct as set out "above, the respondent evinced an intention to bring cohabitation "permanently to an end and that the petitioner was thereby "compelled to live separate and apart from the respondent since "the date of the said conviction and has not since returned to "cohabit with her."

The original allegation of desertion read: "That on July 2, "1940, at the Old Bailey in the City of London the respondent "was convicted of espionage and sentenced to a term of imprisonment for 10 years. In or about the month of August, 1945, "when the petitioner visited the respondent in prison, the respondent told the petitioner that she did not intend to live with him "again and that she would give the petitioner his freedom. In "or about the month of June, 1947, upon her discharge from "prison, the respondent did not return to live with the petitioner, "thereby evincing an intention to bring cohabitation between the "petitioner and the respondent permanently to an end."

Counsel for the wife did not feel able to press objections to the amendment; nor did he feel it necessary to act on the court's intimation that if he felt prejudiced he could seek an adjournment or could have the husband re-called for further cross-examination and the wife for further examination in chief.

J. G. K. Sheldon for the wife. Proof of the wife's conviction and subsequent imprisonment is both relevant and admissible to establish the reason for the de facto separation of the parties between 1940–1947, but it establishes no more than that the wife was so convicted and imprisoned; it is not admissible as evidence that she was in fact guilty of the charges made against her; in this respect the criminal proceedings were res inter alios acta: see *Hollington* v. *Hewthorn.*[2] In the circumstances there was no evidence before the court upon which it could find that the wife had been guilty of cruelty or of constructive desertion.

In any event, the tests of cruelty and constructive desertion summarized in *Cooper* v. *Cooper* (*No.* 1),[3] and established in *Lang*

---

[2] [1943] K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35.

[3] [1955] P. 99; [1954] 3 All E.R. 415.

v. *Lang*,[4] should not, in so far as they relate to criminal acts, be extended beyond offences clearly directed against the other spouse, namely, sexual offences or a persistence in a course of criminal conduct in spite of the other spouse's protestations. [*Warburton* v. *Warburton*[5] was referred to.] They were never intended to cover a single conviction outside those categories (however long the resulting term of imprisonment), or political offences, although it was evident that the disgrace of the conviction would destroy the marriage or break the other spouse's health. In particular, it should make no difference that the political views of the wife are abhorrent to the court—particularly in the case of a woman whose country of birth is at war with the country of her adoption by marriage. If an English-born woman, living in Germany, married to a German soldier who was a keen supporter of the Nazi régime, had, in 1945, given assistance to the Allied Forces in their invasion of that country, could it—or would it—be said that she had thereby deserted or been guilty of cruelty towards her husband?

In any event, the reason for the husband's refusal to live with his wife was not the fact of her conviction, nor of her pro-German activities (he admitted that he could not believe that she was guilty), but rather the fact that, as he told his wife, he had formed an attachment for and wished to marry another woman; he cannot, therefore, now rely on the former ground as justifying his behaviour. [*Herod* v. *Herod*[6] was referred to.]

In the circumstances, when the husband told the wife that he no longer wished to live with her because he wished to marry another woman, he provided the necessary animus deserendi to convert their de facto separation into desertion and was from that date a deserter.

M. G. Polson for the husband. It is conceded that the conviction being res inter alios acta is not admissible to prove the actual facts upon which it is based. It is submitted, however, that the fact of the conviction, and the sentence of 10 years' imprisonment, raise a prima facie inference of conduct which amounts to cruelty against the husband.

[SACHS J. The conviction is the act of the judge and jury, and not of the wife. If the conviction is admissible, in what way am I to take it into account?]

---

[4] [1955] A.C. 402; [1954] 3 All E.R. 571.

[5] The Times, July 10, 1953.

[6] [1939] P. 11; 54 T.L.R. 1134.

The way in which the conviction is to be taken against the wife for the purpose of the present proceedings is that it completely broke up the marriage. She thought National Socialism was desirable in England and associated, in pursuance of that idea, with a man with whom she was later found guilty of espionage.

It was submitted by counsel for the wife that because the conviction is not evidence of the facts upon which it was based it has to be ignored for the purpose of the present hearing. It is, on the contrary, a very relevant factor in the history of the course of the wife's conduct during the marriage to this husband who had spent all his life in the Royal Air Force. It was a course of conduct which led reasonable people to believe that the wife was guilty of espionage. Although that is not sufficient of itself to establish a case of espionage, it is sufficient to raise a prima facie case of cruelty.

The matter may be put somewhat higher, and it may be said that the effect of the conviction on the minds of ordinary men would be to raise a prima facie case of the truth of the matters on which the conviction was based. It would be a great hardship were the husband put to strict proof of all these matters 10 years later.

[SACHS J. Does that not merely go to convenience? On that point *Hollington* v. *Hewthorn*[7] is against you.]

That is so unless *Hollington* v. *Hewthorn*[7] can be distinguished on relevance. In this case, in which the relationship between the parties is being tried, the fact of the conviction *must* be admissible. It is not necessary to go behind the conviction —all that it is sought to adduce is that there was conduct which led to a conviction and all that that meant. All that it is necessary to show is that the wife pursued a certain course of conduct preceding the conviction; if that be accepted, then, having regard to the view which ordinary and reasonable men would take of such a conviction, her course of conduct amounted to cruelty. The burden thereupon passes to the wife to show that the conviction was unlawful.

[SACHS J. None of the cases overruled in *Hollington* v. *Hewthorn*[7] were cruelty cases.]

It is submitted that the facts of the present case constitute cruelty and constructive desertion. In the cases in which imprisonment for criminal offences has been held to constitute cruelty the test has been held to be not the nature of the criminal proceedings or the number of convictions, but this: did the action of the offending spouse, which resulted in his imprisonment, go to the root of the marriage? Applying the rule laid down in *Lang* v. *Lang*,[8] the intention of the wife in the present case was to continue with her espousal of the National Socialist and German cause regardless of the effect of such espousal upon the marriage.

---

[7] [1943] K.B. 587.

In *Jamieson* v. *Jamieson*[9] it was said that an attitude of unwarrantable indifference was sufficient to import intention, and this was further considered in *King* v. *King*.[10] See also *Ivens* v. *Ivens*.[11] In *Crawford* v. *Crawford*[12] it was held that the shock of disclosure and gossip arising from acts of indecent exposure was sufficient to amount to cruelty. That case, it is submitted, is relevant to the present on the issue of the shock to one spouse arising from the conviction of the other.

Cur. adv. vult.

SACHS J., reading his judgment, stated the facts as set out above and continued: It is convenient now first to turn to the issue of cruelty. In limine one encounters the point which is of high importance on several aspects of this cause. What, in a case where the charge against a spouse is cruelty, is established by putting in evidence a conviction of that spouse and the indictment to which that conviction relates.

The case cited to me on this point by Mr. Sheldon was the well-known decision of the Court of Appeal in *Hollington* v. *Hewthorn*.[1] There the plaintiff was claiming damages in respect of the alleged negligence of the defendant driver of a motor-car and his employers: the driver of the plaintiff's car had died and it was sought to put in evidence against the defendants the conviction of the defendant driver for careless driving on the occasion of the collision. Hilbery J. held it to be inadmissible and the Court of Appeal upheld that view.

The judgment of the court was delivered by Goddard L.J., who said[2]: "Before dealing with the authorities, let us consider "the question in the light of the principles of modern law relating "to evidence and see whether they support the admissibility of

---

[8] [1955] A.C. 402.

[9] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

[10] [1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584.

[11] [1955] P. 129; [1954] 2 All E.R. 446.

[12] Ante 195; [1955] 3 All E.R. 592.

[1] [1943] K.B. 587.

[2] Ibid. 593–594.

"the conviction on such an issue as arises in this case." The judgment contains the following passages as regards modern law[3]: "But, nowadays . . . generally speaking, all evidence that "is relevant to an issue is admissible, while all that is irrelevant "is excluded. . . . In truth, the conviction is only proof that "another court considered that the defendant was guilty of "careless driving."

The opinions of bystanders who saw the collision and of the criminal court which heard evidence relating to it are dealt with as follows[4]: "It frequently happens that a bystander has a complete "and full view of an accident. It is beyond question that, while "he may inform the court of everything he saw, he may not "express any opinion on whether either or both of the parties "were negligent. The reason commonly assigned is that this "is the precise question the court has to decide, but, in truth, "it is because his opinion is not relevant. Any fact that he can "prove is relevant, but his opinion is not. The well-recognized "exception in the case of scientific or expert witnesses depends "on considerations which, for present purposes, are immaterial. "So, on the trial of the issue in the civil court, the opinion of "the criminal court is equally irrelevant." After discussing the applicability of the general rules relating to "the best evidence" and to res inter alios acta, Goddard L.J. goes on to say[5]: "It "is for this reason that we have stressed the question of "relevancy, and, indeed, it is relevancy that lies at the root of "the objection to the admissibility of the evidence."

Proceeding then to deal with the authorities and to quote[6] the statement in *Leyman* v. *Latimer*[7] by Bramwell L.J. that "a conviction for felony is res inter alios acta, and of itself is no "evidence in any civil proceeding that the person convicted has "committed a felony" as a ruling affecting the issue before the court, the view that the conviction was admissible as prima facie evidence against the defendants was rejected, the court adding that despite the interests of convenience it was safer for a civil court to come to its decision[8] "on the facts placed before "it without regard to the result of other proceedings before "another tribunal." Thus in *Hollington's* case the conviction itself was never admitted in evidence.

To turn back for a moment to the course of the present case, the conviction and the relevant indictment were admitted into evidence without any objection—and in my view rightly so. On my inquiring of the wife's counsel at an early stage as to what was going to be his attitude to the conviction he obtained instructions and said that the wife would aver the conviction was wrong. In fact when she went into the witness-box she gave evidence on this point, and it seemed to me right to permit her so to do despite the absence of any such issue on the pleadings. Her evidence, however, was confined in substance to bare assertions that the convictions were wrong, and she gave no explanation of what had happened—still less so of any matter which could not have been put before the Central Criminal Court at the time or of any new factor since. Of such evidence as she did give me on this topic I merely record that it was most singularly unconvincing and obviously designed to keep this court in the dark: so it has no evidential weight at all. I would add that she never suggested for a moment that she had at any time tried to give some explanation of the conviction to her husband—not even when in 1945 he said in effect "Look what you've done to me."

---

[3] [1943] K.B. 594.
[4] Ibid. 595.
[5] Ibid. 596.
[6] Ibid. 600.
[7] (1878) 3 Ex.D. 352, 354.
[8] [1943] K.B. 587, 602.

That being the course the trial took, counsel for the wife pressed strongly upon the authority of passages in the judgment in *Hollington's* case[9] that whilst the court could accept in evidence the fact that there had been a conviction and that the wife had been sentenced to 10 years' penal servitude, the court should in effect entirely disregard the conviction on the issues of cruelty and constructive desertion: that in relation to the conduct of the wife it established nothing: and that if the husband alleged any conduct of the wife led to the conviction it was for him to prove it by evidence in these proceedings. Whilst not suggesting that the court should assume the conviction was wrongful, he submitted that it had no more probative effect than if it were wrongful.

For the husband Mr. Polson contended that *Hollington's* case was concerned with relevance and admissibility, whilst here the court is concerned with the inferences to be drawn when once a relevant conviction is in evidence: that in *Hollington's* case a true issue on the pleadings was the precise point purported to be dealt with by the conviction, whilst here the issue was cruelty and the incurring of a conviction was part of an aggregate of material from which the court is asked to come to a conclusion; that the way in which a conviction disturbs relations between man and wife is something quite distinct from any matter upon which authority had been quoted; and that the court should regard the conviction as prima facie evidence that it had rightly been incurred for the offences specified in the indictment, or, if the *Hollington* decision was a bar to that course, then at any rate that the conviction was evidence that the wife's overt conduct had been such as to lead 12 reasonable men to consider she had actively done something gravely against the interests of the country and to lead a judge thereupon to give her a 10-year sentence.

---

[9] [1943] K.B. 587, 601.

At this point it falls to be noted that if one had to scrutinize the pleadings here from a similar viewpoint to that appropriate to the field of cross-demurrers, it would be found that the petition did not originally and probably does not even as amended allege guilt of (as opposed to conviction for) a specified offence, whilst the answer simply traverses the relevant allegations and does not seek to confess and avoid any of them—as, for instance, by alleging that any conviction incurred was erroneous or that there were facts by reason of which this particular conviction should be regarded differently to other convictions. But such considerations do not seem helpful, and anyway I prefer to look at the position as it stands on the evidence as a whole.

The true issue argued by counsel, neither of whom stood on technicalities of pleadings, concerns the effect of a conviction in a field which is in many ways sui generis—the field of human relations between man and wife. It may thus be helpful first to consider what in that field is the likely impact upon one spouse of a grave conviction of the other, and how will it normally be regarded by the former.

That a conviction may have the most profound impact cannot be doubted; it can and not infrequently does knock the bottom out of the marriage, according to the nature of the crime. To exclude the fact of the conviction from the evidence before a court considering the reason why the marriage ended would thus be wholly unrealistic—and was not here argued. Why does it have that impact? Of course, the mere physical separation caused by imprisonment is one factor. But that is often only one factor among several. The conviction may have a direct and profound effect on the life and health of the other spouse; certain types of conviction may, as this one did, tend to bring suspicion and obloquy directly on that other spouse—with attendant effects on health. How is a conviction regarded as between spouses? Sometimes, as here, the innocent spouse adopts at first a loyal attitude of "I can't believe it"—or perhaps more strictly "I "won't believe it"; but whether or not that is the first reaction, realization normally ensues that the convicted spouse has done something which has led a jury of reasonable men to regard him as guilty: and such is the general regard for justice as administered in this country that only in exceptional cases do those near to the convicted spouse think otherwise—and that when they have some special reason for so thinking. "Look what "you have done to me" expresses a typical view of a party to a marriage, both as to the guilt of the convicted spouse and the effect on his or her innocent self. Accordingly, in this particular field, to assert that those most intimately concerned normally regard the conviction as no evidence of the person convicted having done something to incur the verdict is also unrealistic.

Once the conviction is admissible in evidence as being relevant, what then is the correct direction to a jury as to how that conviction should be regarded in a case like the present, and in particular as to what inferences respectively may and may not be drawn against a spouse from the fact that the conviction has been incurred? Is that direction to the effect: (a) You may draw no inferences from the conviction as to the conduct of the spouse and you must regard it in the same way as an accident or misfortune affecting the marriage for which no blame is to be attributed to the spouse convicted; or (b) you are entitled as regards the conduct of the spouse convicted to draw such inferences as a reasonable man would normally draw on becoming aware of the conviction against the background disclosed in evidence—and in particular such inferences as the other party to the marriage would normally draw?

If the point as to inferences in a case such as the present is free from binding authority, one can perhaps first turn for guidance to an everyday event in the courts—albeit in another field—I refer to the question put in cross-examination to credit in civil courts as to whether the witness has been convicted of an offence involving fraud. In that connexion there is also the provision (applicable to civil procedure) of section 6 of the Criminal Procedure Act, 1865,[10] which can result in the conviction itself becoming admissible. In such cases, at any rate, a direction of the type of the first part of (a) would clearly be wrong—and indeed absurd.

---

[10] Criminal Procedure Act, 1865, s. 6: "A witness may be questioned "as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies or does "not admit the fact, or refuses to "answer, it shall be lawful for the "cross-examining party to prove such "conviction; and a certificate containing the substance and effect only "(omitting the formal part) of the "indictment and conviction for such "offence, purporting to be signed by

Other instances of a conviction being both admissible and relevant in civil proceedings have not been discussed before me, but generally speaking I would, subject always to authority, find myself on a question of inferences in sympathy with that passage in the 1944 L.Q.R. at p. 300 where, in relation to such matters, it is submitted " although experience shows that the law and the " ordinary practice of the community are not always in accord, " there is at least a presumption against a legal rule which gives " rise to a conflict between them." For a judge to have to give in the same cause as regards the same man in regard to a conviction direction (b) as regards his credibility and direction (a) as to his conduct would be odd. Unless, therefore, bound by authority to decide in the present case in favour of direction (a), I would be reluctant to do so.

No authority dealing directly with the point was cited to me, nor have I so far come upon such an authority: indeed, in the particular field under consideration the point could hardly have arisen in its present form until both the judgment in *Hollington's* case[11] had crystallized the modern principle by reason of which a conviction may be inadmissible as irrelevant, and in addition the authorities of the last few years had clarified the law as to what may constitute cruelty. The present position as regards, at any rate, modern authorities on convictions as evidence, thus appears to be as follows:

Firstly, *Hollington's* case[11] is a direct decision on admissibility only; and the wide dictum there quoted[12] of Blackburn J. in *Castrique* v. *Imrie*[13] was concerned with a parallel situation.

Turning secondly to libel cases—for such was *Leyman* v. *Latimer*[14]—I am inclined to doubt if they help much in the field now under consideration, and that doubt particularly applies to decisions on pleading points, when the defamatory words may be

---

" the clerk of the court or other " officer having the custody of the " records of the court where the " offender was convicted, or by the " deputy of such clerk or officer, (for " which certificate a fee of 5s. and no " more shall be demanded or taken,) " shall, upon proof of the identity of " the person, be sufficient evidence of " the said conviction, without proof " of the signature or official character " of the person appearing to have " signed the same." (The section is qualified by section 1 of the Criminal Evidence Act, 1898, as to the cross-examination of an accused person who elects to give evidence on oath.)

[11] [1943] K.B. 587.

[12] Ibid. 599.

[13] (1870) L.R. 4 H.L. 414, 434.

[14] 3 Ex.D. 15, 352.

construed so widely and a plea of justification must be construed so narrowly. I have, however, considered the judgments in both reports of *Leyman* v. *Latimer* [14] (a case on cross-demurrers noteworthy for the conflict of eminent judicial views on more than one point, as the issues went up from Blackburn J. to Cleasby and Pollock BB. and then to Bramwell, Brett and Cotton L.JJ.), and find that Bramwell L.J. in his above-cited statement [15] (quoted in *Hollington's* case [16]) seems to have differed on the relevant point from Brett L.J., who, in relation to the defamatory words "felon editor," said [17]: ". . . a jury might "possibly find that the plaintiff is a felon within its meaning; for "it is admitted that he has at some time been convicted of felony ". . . and I suppose and shall assume that the plaintiff was "rightly convicted", whilst the other judgments do not refer to that point. I note, too, that neither the standard textbooks on libel current immediately before *In the Estate of Crippen* [18] (which adopted a view on admissibility now overruled by *Hollington's* case [19]), nor the parallel books of today, appear to rely on the above passage in Lord Bramwell's judgment—which did not form the basis of the decision of the court as a whole.

Next, one finds that on questions of credit a conviction is prima facie assumed to be justified. Then, finally, as to cruelty —a rather special field—there is no considered decision available.

In the above circumstances it does not seem right to ascribe to phrases of the width of those quoted in *Hollington's* case [19] an intent that they be applied rigidly to a whole range of fields not then under consideration—however persuasively it may be argued that one might follow such a relatively simple course. Accordingly, I think it is right to accede to the arguments of Mr. Polson, and thus to reject direction (a) and to adopt direction (b) as being correct in cases such as the present.

The result is, that where a marriage breaks down upon one spouse incurring a conviction, it is open to a jury at least to draw the inference that the overt conduct of the convicted spouse has been such as to lead 12 reasonable men to consider him or her guilty. In many cases I appreciate that that is tantamount to the drawing of an inference (in the absence of other acceptable evidence) of guilt—but that is not always necessarily so. In a cruelty case the issue is not whether the conduct which can be inferred constitutes the precise offence set out in the record of conviction but whether that conduct, even if falling short of the full, or perhaps any, offence, was such as if discovered would be calculated to bring about harmful effects to the other spouse. Thus, as regards a husband convicted of attempted rape on a young girl, it may in some instances make little or no difference from the cruelty angle whether what the husband had done constituted attempted rape, indecent assault, or perhaps merely an act preparatory to either: and it might on the particular facts be open to a jury in a matrimonial cause to infer any of these from the conviction.

---

[14] 3 Ex.D. 15, 352.

[15] Ibid. 352, 354: see n. 7, ante.

[16] [1943] K.B. 587, 600.

[17] 3 Ex.D. 352, 356.

[18] [1911] P. 108.

[19] [1943] K.B. 587.

In taking this view I am fortified by having ascertained that it is usual in this Division in cruelty cases to accept a conviction, even where there has been no plea of guilty, as prima facie evidence of conduct resulting in that conviction: for instance, in each of the burglary cases—*Warburton* v. *Warburton*,[20] decided in the Court of Appeal, and *Woollard* v. *Woollard*[21]—I understand that at any rate one conviction seems to have been so accepted. To do otherwise might tend to result not so much in inconvenience as in a denial of justice, especially where the cumulative effect of a number of convictions is relied upon by a petitioner. I need hardly add that of course the decision in *Hollington's* case[22] is applied wherever the matrimonial offence charged is co-extensive with the subject-matter (e.g., rape, incest, or sodomy) of the criminal conviction: there the facts constituting the offence have to be established de novo.

Applying the above conclusions to the present case, I draw the inference that the wife had been guilty of active and overt conduct of the type called " treasonable " and that it was that which led to the convictions for espionage and to the sentence of 10 years thereon.

On that footing the question arises as to whether in all the circumstances of the present case that conduct constituted cruelty to her husband, a serving R.A.F. sergeant, whom it in fact injured in the way previously mentioned.

The authorities in which it has been discussed whether a conviction (in which term I include the conduct leading thereto) constituted cruelty to the other spouse, have mostly related to sexual conduct.

Mr. Sheldon submitted that sexual convictions were in a class apart as regards constituting cruelty: that there was no reported case of a single conviction for any other type of offence constituting cruelty, and that in any event a conviction for what he euphemistically called "political reasons" could in no circumstances constitute cruelty. It is, however, my view that in principle it does not matter whether the conviction relates to a sexual, violent, fraudulent, or treasonable matter. The first questions in each case must be: does the single conviction, viewed against the background of the particular marriage, tend to strike at the roots of the matrimonial relationship, and has it inflicted injury on the health of the other party? If the single conviction is of the requisite degree of gravity and has the above effect, then the court can look at the circumstances as a whole and see whether or not there is to be inferred that intention to injure which leads to a finding of cruelty.

---

[20] The Times, July 10, 1953.

[21] [1955] P. 85; [1954] 3 All E.R. 351.

[22] [1943] K.B. 587.

I should perhaps add that to my mind the difference between a single conviction and a succession of convictions is, in relation to cruelty, simply a practical one. Where there are a number the effect on the other spouse is cumulative and may more easily be shown to have resulted from the convictions: in addition, the remonstrances of the other spouse against a continued course of conduct can often provide evidence from which the convicted spouse's intent to injure may be the more readily established. Where there is only a single conviction it must be of special gravity and the surrounding circumstances would be somewhat exceptional before a court is satisfied that the elements constituting cruelty are convincingly proved.

Wherever the word "conviction" is used above (or indeed elsewhere in this judgment) it is, of course, obvious that the conduct of the convicted spouse, its discovery, and the publicized verdict thereon each plays its part in affecting the other spouse; but it is the conduct which is the true cause of all that follows—and it is that conduct which has to be proved.

That the conviction here was of high gravity is clear: and where, at any rate, the other spouse is, as here, a loyal regular serving airman, it is of a nature that strikes a fatal blow at the roots of joint life in mutual confidence as well as inflicting injury on the husband's career. That the conviction did strike at the roots of this marriage and did injure this husband's health is established. There thus remains only the question of intent.

On this I need but refer to a few short passages from recent authorities. There is firstly the judgment of Karminski J. in *Cooper* v. *Cooper* (*No.* 1),[23] where he summarizes the law by first posing the question: "I have to ask myself whether a man of "apparently normal intellectual powers should or could know of "the natural consequences of an indecent assault on the child "of the marriage on his wife," and goes on to say that he could not help but infer that the husband must have assumed or known, if he thought about it, that it would cause grave distress and injury to health.

---

[23] [1955] P. 99, 114.

Next came *Ivens* v. *Ivens*[24] (another sexual offence case), where Lord Goddard C.J. said: "I can imagine nothing which "would be more likely to affect the woman's health, as in fact it "did, and I can conceive of no conduct more calculated to justify "the court in saying that the husband knew perfectly well what "the effect of his conduct would be upon his wife and upon the "state of her health, and yet, careless of or indifferent to what "the effect would be, continued to carry on this filthy conduct."

Thirdly, in *Crawford* v. *Crawford*,[25] Lord Merriman P. (once more in relation to sexual offences) refers to the justices' finding that the husband's conduct "'. . . was such as must have been "'known by him had he considered the matter, to be likely to "'injure her [the wife's] health when she came to know of it, "'both by reason of the shock of the disclosure and of the gossip "'which would be sure to arise in the small community in which "'they lived'", and approves of the inferences of cruelty drawn by the justices from those and other facts.

Finally, there is *Waters* v. *Waters*,[26] reported since the trial of the present case. There Lord Merriman P.[27] states that the reasoning in *Lang* v. *Lang*[28] applies to cruelty cases, and Wallington J.[29] summarizes the position by saying that a man may be cruel to his wife if his attitude is: "'I am going to live "'my own life in my own way, whatever the consequences to "'my wife.'"

In the present case the wife admitted that she realized that it would hurt her husband if he knew she had joined the British Union of Fascists. It is obvious that she realized that if she engaged in overt treasonable activities it would hurt him even more. She was an intelligent woman, and in choosing to pursue the active conduct which led to her conviction she must have done so having deliberately decided that she would adopt a course which could injure him gravely. Having in her own mind to choose between Hitler and her husband, she rejected her husband reckless of the potential consequences to him. Even without the assistance of *Lang* v. *Lang*[30] (to which I will refer on a later point) I have no hesitation in inferring her intent to injure. She fully deserved the husband's reproach of "Look at what you "did to me," in 1945, and her conduct constituted cruelty.

---

[24] [1955] P. 129, 132.

[25] Ante 195.

[26] Ante 344; [1956] 1 All E.R. 432.

[27] [1956] 2 W.L.R. 661.

[28] [1955] A.C. 402.

[29] [1956] 2 W.L.R. 661, 676.

It was rightly neither pleaded nor argued that the cruelty had ever been condoned; and as regards the delay before the presentation of the petition, it seems to me that long though it was, it is excusable in all the circumstances of the case: indeed, I doubt if until recently it was realized exactly what legal claim the husband was entitled to put forward. In any event I would exercise in his favour that discretion a court has in regard to matters of delay.

Having regard to the possibility that this case will be taken further, it is proper for me also to deal with certain other issues that have been raised—and in particular to find such facts as may be relevant to those issues.

As regards desertion, the case put forward by each spouse, irrespective of the issue which arose by reason of the wife's conviction, was that the other had during the course of the enforced separation due to the prison sentence evinced an intention to desert. *Beeken* v. *Beeken*[31] was cited to show that where imprisonment is the cause of separation an animus deserendi may supervene and then desertion will begin from that moment unless there is consent by the other spouse.

Each spouse here relied on a statement alleged to have been made to the other during the husband's visits to the wife's prison in 1945. Those visits numbered three in all and I am satisfied that on the first of these the wife did say to the husband that she did not want him any more and made it plain that she did not intend to make a home with him after her release. This state of mind on her part is consistent with her determined adherence to the Nazi point of view, the way in which she despises opposition to that view, and to her having sufficient intelligence to realize that life with her husband in his home town would in practice be impossible. It was after that interview —and not, as alleged by the wife, earlier—that the husband's association with another woman of his acquaintance took a closer shape than before and led to the situation in which he desired to link his life with hers.

At one of the next two prison interviews, however, the husband informed his wife of this desire, and there was then discussion as to the way in which the husband and wife could seek a divorce. The matter was left open to the wife either to start proceedings herself or to send the husband written confirmation of her desire not to live with him in a letter which he could use in aid of such proceedings as he might start. A correspondence developed on these lines, and it is obvious that the only obstacle to the wife having taken one or other of the above courses was her desire to obtain to her own satisfaction admissions as to her right to certain property in the home: thus at that stage it was merely financial matters which stood in the way. Indeed, the wife has a strong desire to secure any financial advantage that is within her power up to this very date, when she is demanding maintenance.

---

[30] [1955] A.C. 402.

[31] [1948] P. 302.

When once the husband had told the wife of the other woman, she turned this round into a statement by him that he did not want her (the wife) and thus sought to fasten the animus deserendi on him. I am, however, clear that at no time from her statement at the first prison interview in 1945 did she depart from the view that she did not want to return to her husband. None of her letters suggest such a return—although one of September 21, 1945, contains a phrase (to which I will later refer) which was fallaciously relied on as showing such a desire.

In the above circumstances the only matter which troubled me was whether the tenor of the correspondence as a whole showed that by the time the wife was due to leave prison there was a consensual separation. Neither party at that stage showed any desire to live with the other. There is, however, this difference between their positions. On the wife's side she had taken the initiative and had as from the return of her husband to England both held and shown an unswerving intention not to live with him. As regards the husband, his action really constituted a recognition of what were his wife's intentions, and thus an adoption of the only course open to him. I am inclined to the view that such a recognition does not in law result in that type of mutual agreement which terminates desertion, and thus does not bar the husband from obtaining a decree on that ground; but having decided the issue of cruelty, it does not seem necessary for me to deal more fully with this point.

I have so far considered the husband's charge of desertion without taking into account the wife's conviction. The fact that she had incurred that conviction was, however, relied on as also being a ground upon which she was guilty of constructive desertion. That her conduct in incurring the conviction would, if it became known, render a joint life with him in the matrimonial home at Portsmouth impracticable, was something which in my view was not merely obvious but was something which, as above indicated, was well appreciated by her. It is pointed out in *Lang* v. *Lang* [32] by the Judicial Committee that where a spouse is well aware that the probable result of his acts will be to drive the other party to the marriage into separation, his intention is so to do, whatever the consequence, even though he may hope or desire that the particular consequence will not result. Accordingly, the same matters that lead me to conclude that the wife was guilty of cruelty, result in it being established that she in 1940 evinced an intention to make continued matrimonial life impracticable—and that would have been my finding even if there had been no injury to the husband's health.

I need hardly add that the later death of the husband's mother in an air raid is not a matter which has been taken into account by me—although the bitterness of feeling against the wife in the husband's family was clearly increased by that factor. The wife's intentions, however, ought not to be inferred from events of which she had at the time no knowledge.

It follows that the wife's desertion may well date back to long before the 1945 prison interview, but I would prefer to regard the wife's conduct in incurring the conviction merely as strong corroborative evidence of her capacity to reach a firm conclusion against the continuance of matrimonial life and thus as adding strength to the conclusion that what she said at the first prison interview in 1945 was meant by her to be decisive.

Turning now to the wife's charges against her husband of desertion, the findings of fact as to what happened in 1945 conclude against her the case she sought to set up. Further, having once evinced her firm intention not to make a home with him on her release from prison, she never resiled from that position. At no time after she made that statement did she in any way intimate to him that she desired after all to join him in any matrimonial home: on the contrary, in my view, she never desired so to do and I do not accept any evidence she gave to the contrary. As to the passage in the letter of September 21, 1945: "As soon as I get my release I will be home with you, unless you "made some arrangements"—when properly construed against the background of what had been said previously and indeed of what was in the same letter, it constituted neither a hope they might make a home together nor a request that there should be such a home. Those words were intended to communicate a threat. The meaning was to the effect: "If you do not make "some satisfactory arrangements about my getting a proper share "of the furniture, I will come to where you are living with your "sister and make trouble." It was in this very letter that she used the word "cowardly" of the husband and his family and stated she would "not change for any of you."

---

[32] [1955] A.C. 402, 429.

It was in this way that it came about that she never returned to her husband when she left prison and sought the anonymity which she realized she could not get if she came to Portsmouth. It follows that her continued decisive intention not to join her husband bars her claim to a decree.

I should perhaps add that I do not accept her version of certain letters from her husband which she alleges are missing.

In the above circumstances the question of whether the correspondence after 1947 constituted an "agreement" on her part to live apart need not be examined, save to say that she is in a far worse position on this point than is the husband: on that matter I do not think further findings of fact can assist. Nor does it seem necessary to deal separately with the husband's reply to the charge of desertion, namely, that he had good cause for staying separate, as the matters previously considered clearly cover this point.

This is a case in which both parties have sought a decree, and I have already indicated that I do not accept the wife's evidence that she desires to live again with her husband. On the contrary, the true reason why this case has been contested is a financial one. The wife desires maintenance from the husband and considers that she would obtain it if the decree is awarded to her. It is perhaps as well, therefore, to say that even were I wrong in holding the husband to be entitled to a decree, yet in any proceedings by the wife for maintenance in which the court is entitled to take into account her conduct, this seems to me to be eminently a case in which that conduct would operate in diminution—even to the point of extinction—of any sum which might otherwise be due to her. The true cause of the marriage breaking up was the wife's continuing preference for the Fuehrer over her husband.

There will be a decree accordingly, and the prayer of the answer is rejected.

Decree nisi on prayer of petition.

Solicitors: *R. V. Stokes & Metcalfe, Portsmouth; Wedlake, Letts & Birds.*

J. B. G.

1956
Feb. 7, 21.

Sachs J.

THOMPSON *v.* THOMPSON.

Husband and Wife—Divorce—Death—Presumption of death and dissolution of marriage—Continual absence for seven years—No reason to believe other party living within that time—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 16 (1), (2).
Presumption—Rebuttable—Death.

A husband presented a petition for a decree of presumption of death and dissolution of marriage seven years and seven days from the date when his wife had last been seen or heard of:—

Held, (1) that the phrase in section 16 (2) of the Matrimonial Causes Act, 1950, that in such proceedings the fact that for a period of seven years or upwards "the petitioner has no reason "to believe that the other party has been living within that time" shall be evidence that he or she is dead until the contrary is proved, was to be interpreted as meaning "if nothing has happened within "that time to give the petitioner reason to believe that the other "party was then living."

(2) The test whether or not there was "reason to believe that "the other party was then living" related to the standards of belief of a reasonable man and not those of the particular petitioner.

(3) That on the facts a decree nisi should be granted.

Parkinson v. *Parkinson* [1939] P. 346; 55 T.L.R. 860; [1939] 3 All E.R. 108 considered.

UNDEFENDED PETITION by a husband for a decree of presumption of death and dissolution of marriage.

The parties married in 1920, both then being aged 21. There were three children of the marriage born respectively in 1921, 1926 and 1930. The husband and wife last lived together in September, 1937, when the husband left the wife and assumed care of the children. From December, 1937, to 1946 there were a number of occasions when the parties contested, before the justices, issues as to whether the husband should pay the wife any, and if so what, maintenance, and as to who should have custody of and access to the children.

From December, 1937, onwards the husband was under a liability, by virtue of justices' orders, to pay his wife maintenance—which in the first place was fixed at 7s. 6d. a week and later increased to 10s. After the order of December, 1937, the wife was not bound to cohabit with the husband and did not, in fact, do so. The husband had not seen her since 1942.

By 1942 the wife had, in fact, become a tramp of no fixed abode, carrying her belongings in a bag. She used, however, to collect her maintenance comparatively regularly from the justices' court at Ealing until March 18, 1946. After that date she did not call again until police inquiries as to her whereabouts resulted in her visiting the court on December 15, 1947, for the money the husband had meanwhile deposited for her week by week. She next went there, for the same purpose, on February 2, 1948, and after that once more, on February 17, 1948. Since then no one was known to have seen her, and the money paid into the court office regularly by the husband had not been collected—the sum available there at the date of the hearing totalling £136, being the amount that had been reached by 1953 when the husband was advised to stop continuing such payments.

There were no relatives of the wife from whom news of her was available, and extensive inquiries in recent years neither led to the wife being traced nor disclosed the existence of any relevant registration of death.

On February 24, 1955, seven years and seven days from the date when the wife was last seen, the husband filed a petition for a decree of presumption of death and dissolution of marriage under section 16 of the Matrimonial Causes Act, 1950.[1]

The hearing of the petition, which was undefended, was adjourned for argument by the Queen's Proctor.

Colin Duncan for the Queen's Proctor. The question before the court is the construction of section 16 (2) of the Matrimonial Causes Act, 1950. Section 16 (1) of the Act deals with the situation where a presumption of death arises from positive evidence and not merely from the passage of time; the operative word is "may" not "shall," in other words, the discretion is a judicial one and not one of right. In contrast to the wording of section 16 (1), section 16 (2) provides that an absence of seven years in certain circumstances "shall" be evidence of death until the contrary is proved, and this subsection is the antithesis of subsection (1) in so far as under that subsection the petitioner may come to the court at any time.

---

[1] Matrimonial Causes Act, 1950, s. 16: "(1) Any married person who "alleges that reasonable grounds "exist for supposing that the other "party to the marriage is dead may, "if he is domiciled in England, pre- "sent a petition to the court to have "it presumed that the other party is "dead and to have the marriage dis- "solved, and the court, if satisfied "that such reasonable grounds exist, "may make a decree of presumption "of death and of dissolution of the "marriage.

"(2) In any such proceedings the "fact that for a period of seven years "or upwards the other party to the "marriage has been continually "absent from the petitioner, and the "petitioner has no reason to believe "that the other party has been living "within that time, shall be evidence "that he or she is dead until the "contrary is proved."

To invoke section 16 (2) the petitioner must show the continual absence of the respondent during seven years and that he has no reason to believe that the other party was living within that time. As to reasonable belief, it is submitted that the test is not: Was it in the circumstances reasonable for that petitioner to believe, but: Was it reasonable for a reasonable man so to believe? A consideration of *Parkinson* v. *Parkinson*,[2] *Chard* v. *Chard* (*orse. Northcott*)[3] and *Bradshaw* v. *Bradshaw*[4] emphasizes the difference between the statutory period of seven years and the common law period.

[SACHS J. The word "satisfy" is used in both sections 4 and 16 of the Matrimonial Causes Act, 1950; does it not follow that the same cogency is required, both relating to matters of status?]

A presumption of law is created by section 16 (2) until the contrary is proved, which means no more than that according to the statutory rules of evidence the respondent is shown to be alive. The presumption of law created by section 16 (2) endures until the contrary is proved, that is until something has happened to outweigh the presumption.

[SACHS J. referred to *Nepean* v. *Doe* d. *Knight*[5] and the Cestui Que Vie Act, 1666.]

It is the submission of the Queen's Proctor that in the present matter the court ought not to be guided to too great an extent by cases decided in the Chancery Division.

As to the true construction of section 16 (2), *Parkinson* v. *Parkinson*[6] is of assistance in considering what a petitioner must prove to bring himself within the subsection. As stated in that case, the phrase "no reason to believe" that the respondent was living within the seven year period must exclude the realm of pure speculation. Moreover, rule 4 (1) (*j*) of the Matrimonial Causes Rules, 1950, includes a reference to "steps which have "been taken to trace the respondent." The effect of a failure to inquire, however, does not arise in this case and the Queen's Proctor desires to reserve the point whether the court, if satisfied that no inquiries have been made, can nevertheless put weight upon the petitioner's reasonable belief. *Hickman* v. *Upsall*[7] is instructive as to the nature of reasonable belief. In that case a woman disappeared after setting out on a pedestrian tour in March, 1866. It was held that she should be presumed to have died shortly after June, 1866, when she failed to apply for an allowance to which she was entitled although known to be in extreme poverty. There were held to be reasonable grounds upon which to base the presumption of death, although it should be noted that the matter was not before the court until 1875.

---

[2] [1939] P. 346; 55 T.L.R. 860; [1939] 3 All E.R. 108.

[3] Ante 259; [1955] 3 All E.R. 721.

[4] Ante 274n.

[5] (1837) 2 M. & W. 894.

[6] [1939] P. 346, 349–350, 353, 357.

The petitioner must prove the seven years' separation and, for the purpose of this case, it is accepted that the seven years are those immediately preceding the presentation of the petition, and the court must be satisfied that he had no reason to believe the respondent to be alive during that period. The belief must be one which would be formed by a reasonable petitioner in the circumstances. Subsection (2) is, however, subordinate to subsection (1) and, therefore, the whole section gives the court a discretionary power which could be exercised against a petitioner who merely passively allowed the seven years to pass with, so to speak, his head in the sand.

[SACHS J. Is the ordinary grammatical interpretation of the words " . . . and the petitioner has no reason to believe that the " other party has been living within that time . . ." consistent with the intention of Parliament, for, if there is a state of affairs in which the common law presumption of continuance applies, there is reason to believe that the respondent is alive? If not, the whole purpose of the section goes and one must ask: Is there an alternative construction? Are the words used in the subsection intended simply to relate to affirmative events or facts arising during the seven years from which a conclusion may be reached?

Am I not faced with a pure question of the construction of the words of the subsection, and if out of two possible interpretations one gives an absurd result in the normal run of cases may not the court accept the other?

But then one must also consider exceptional cases. The present is a typical case of pure disappearance, but if one is faced with the case of an explorer who goes off to a remote part of the world and is not heard of for 10 years, or a prisoner of war who is not heard of for more than seven years, might one not get a wrong result by interpreting the statute as merely applying to events within the seven years?]

---

[7] (1878) L.R. 20 Eq. 136.

The purpose of the section was to give a statutory right to dissolution which, once granted, could not be impeached if the presumption proved incorrect (*Wall* v. *Wall*[8]) in the circumstances, for instance, which were the subject of the decision in *Manser* v. *Manser*.[9] If a spouse says that he last saw his wife on a certain date when she was in good health and that she said "I have finished with you" and left, and that more than seven years have passed and inquiries have been made not resulting in any news of the missing spouse, then the law will step in with the statutory provision. There is no presumption that a person died at any particular time during the seven years. That would produce a ridiculous result, and it was not intended that a petition could be presented at any time before the seven years has run. The object of the Act is to regularize status.

[SACHS J. It seems that I have to make a clear-cut decision: Can I or can I not take into account facts which have happened before the seven year period began to run?]

The section does no more than codify the common law presumption as set out in *Chard* v. *Chard* (*orse. Northcott*).[10] [Latey on Divorce[11] was referred to.] Provided that the necessary inquiries are made and the petitioner states his ground for his belief, there should be a decree. The words of the subsection are ". . . the petitioner has no reason to believe . . ." The verb is not "had," and it is submitted that "has" means either when giving evidence or at the end of the seven years. See by comparison section 16 (4).

If it is to be said that because the wife was alive before the seven years began to run she remained alive during some part of that period the problem arises of tacking on to the seven year period that period during which the wife was reasonably assumed to be alive. "Continuously absent" must be equivalent to continuously unexplainably absent. The explorer, for instance, has a reason for absence.

Reason to believe, it is submitted, means reason to believe during the seven year period only. It is clearly undesirable, however, that there should be a decree if something which has occurred during the seven years would have led the court to think that the other spouse was alive, and this must be so even though evidence of that something was not admissible, for instance, because it was hearsay. Since the court is not being asked in the present case to arrive at any date within the seven years on which the respondent should be presumed to have died, it can safely act since, even if the respondent was alive and in robust health at the beginning of the seven years, this merely emphasizes the fact that, not having been seen since, she is now unlikely to be alive: *Reg.* v. *Lumley.*[12]

---

[8] [1950] P. 112; 65 T.L.R. 731; [1949] 1 All E.R. 927.

[9] [1940] P. 224.

[10] Ante 259, 272.

[11] 14th ed., p. 99, para. 183.

The legislature sanctions a presumption of death after seven years; the presumption of continuance of life is merely one of fact, and it is submitted that the former presumption of law prevails over it. On the facts of this case it is submitted that the court should grant a decree.

N. C. Lloyd-Davies for the husband. The policy of the Act is to safeguard against mere declarations resulting in nullity if the missing spouse reappear. Section 16 (2) deals with the mode of proof in a particular kind of case, namely, where the respondent has disappeared. Suppose the situation where a person 25 years of age in good health disappears. If the ramification which has arisen in the present case has any substance, then one must act upon the actuarial basis of survival and the reasonable man might not be entitled to belief in death until, say, 20 years have passed and then wait another seven years to take advantage of the statutory presumption. It is submitted that to put such an interpretation upon the statute would be to make it lacking in good sense.

The common law and the statutory presumptions are two quite different matters. The statutory presumption embodied in section 16 (2) is a rule of evidence, an admittedly artificial creation to be applied in cases in which there is nothing at all by way of concrete evidence, and its purpose is to provide the "magic" of seven years which was rejected in *Chard* v. *Chard (orse. Northcott)*[13] with regard to the common law presumption. In *Parkinson* v. *Parkinson*[14] the court was saying that there was no reason to believe that the respondent was alive any more than dead three years before the seven years, and a decree was, nevertheless, granted. The object of the artificial seven year period as laid down in section 16 (2) is to do away with the presumption of continuance or survival. If it is a matter of "pure speculation" that a person may be alive during the seven year period, that may be disregarded.

---

[12] (1869) L.R. 1 C.C.R. 196.

[13] Ante 259.

[14] [1939] P. 346.

It is conceded that "reason to believe" means the belief of a reasonable man.

Cur. adv. vult.

SACHS J., reading his judgment, stated the facts as set out above, and continued: The case is thus of the type sometimes referred to as concerning the "mere disappearance" of a spouse, and the petition is brought by virtue of section 16 of the Matrimonial Causes Act, 1950, which replaces verbatim section 8 of the Matrimonial Causes Act, 1937. Section 16 (1) sets out that the court, if satisfied that reasonable grounds exist for supposing that one party to a marriage is dead, may make a decree of presumption of death and of dissolution of marriage. Section 16 (2), upon which the petitioner has founded his prayer for relief, provides: "In any such proceedings the fact that for a period "of seven years or upwards the other party to the marriage has "been continually absent from the petitioner, and the petitioner "has no reason to believe that the other party has been living "within that time, shall be evidence that he or she is dead "until the contrary is proved."

In section 16 (2) the legislature chose to use phraseology which had material distinctions from that adopted respectively in what is now known as the Cestui Que Vie Act, 1666, and in section 57 of the Offences against the Person Act, 1861—the precise terms of both of which are set out in *Chard* v. *Chard (orse. Northcott)*,[1] nor did it follow exactly the terms of Lord Blackburn's definition of what, in relation to presuming death, is sometimes called the "seven year rule": see his speech in *Prudential Assurance Co.* v. *Edmonds*,[2] which provided the best known authority on that rule when the Matrimonial Causes Act, 1937, was passed.

It thus falls to be interpreted according to the normal rules applicable to ascertaining the intention of Parliament in an Act when there is a history of past legislation dealing with similar subject-matter. On that footing section 16 (2) is the most recent of quite a long line of provisions which lay down an appropriate and convenient rule as to the evidence on which a court may, prima facie, presume death for a particular purpose—without it necessarily having to examine all those matters which might have to be investigated in the absence of statutory guidance. It may thus be assumed to be intended to provide its own clear-cut test as to when the death of one spouse can be presumed for the specific purpose of allowing the other to re-marry. Unfortunately, even on that simple basis, the subsection is, at more than one point, far from easy to interpret; but the following matters at any rate, upon the arguments addressed to me, appear to be clearly established as regards that phrase "the petitioner has no reason to believe that the other "party has been living within that time," which for the purpose of the present case is the critical phrase.

---

[1] Ante 259, 267; [1955] 3 All E.R. 721.

[2] (1877) 2 App.Cas. 487, 509.

First, the test to be applied by the court relates to the position as apparent to a single specified person—the petitioning spouse.

Secondly, the onus of proving that the position is one which brings him within the benefit of the subsection lies upon the petitioner (*Parkinson* v. *Parkinson*[3]). It is for him to state fully and frankly all the relevant facts known to him. In the present case he has taken that course and has also made appropriate inquiries outside the ambit of his personal knowledge. (Whether or not a petitioner can bring himself within subsection (2) without making such inquiries is a point that does not arise here, and in accordance with Mr. Colin Duncan's request I record that the Queen's Proctor desired to reserve his submission on that point.)

Thirdly, the test as to whether or not there is "reason to "believe that the other party has been living" must relate to the standards of belief of a reasonable man and not to those of the particular petitioner. The legislature could hardly have intended that, on the same set of facts, the right to relief might vary according to whether the petitioner happened to be a moron or a senior wrangler—with their differing approaches to what constitutes such "reason."

Fourthly, facts from which the inferences are no more than "pure speculation" do not constitute "reason to believe"—see this troublesome phrase discussed by Bucknill J. in *Parkinson* v. *Parkinson*.[4] The line between "pure speculation" and "reason to believe" being difficult, it can suffice for the purpose of the present case to say that where, on the relevant facts known to the petitioner, it seems to a reasonable man that there is more than a fifty-fifty chance of the "other party" being alive, then the matter undoubtedly comes out of the realm of pure speculation, and the petitioner cannot be held to have

[3] [1939] P. 346, 353; 55 T.L.R. 860; [1939] 3 All E.R. 108.

[4] Ibid.

proved that he or she "has no reason to believe" that the other party has been living.

Fifthly, it is clear that, if at any point in the seven years preceding the petition—be it either in the first or last week of those years—there was "reason to believe" (within the meaning of the subsection) that the other spouse was alive, the petitioner cannot avail himself of subsection (2). That appears to me to be the obvious interpretation of the phrase under consideration, and incidentally corresponds with the interpretation of the parallel words in section 57 of the Offences against the Person Act, 1861 (cf. *Reg.* v. *Cullen*,[5] where Patteson J. dealt with the identical words in 9 Geo. 4, c. 31, s. 22).[6]

It is, perhaps, convenient at this point to note, in parenthesis, that mutatis mutandis the wording of the above section 57 corresponds with that of the subsection (2) under consideration, save that in the above section 57 the words "and shall not have "been known by such person to be living within that time" are to be compared with the phrase in subsection (2) "and the "petitioner has no reason to believe that the other party has "been living within that time." The adoption in the Act of 1937 (reproduced again in the Act of 1950) of the words "has no "reason to believe" in place of the words "shall not have been "known" may be assumed to have been made in knowledge of the then Lord Chief Justice's statement in a bigamy case, *Rex* v. *Lund*[7]: "The statute relating to the excuse of seven years' "absence is a beneficial one in favour of persons who enter upon "a marriage like this. The prosecution must show knowledge. "Inference is not knowledge."

The words "reason to believe" may thus well have been introduced into subsection (2) to make admissible a wider range of matters than is made admissible by the word "known."

Starting from the footing of those above set out five matters, which are clear in relation to the critical phrase, there arises in an unusually acute form the final point relevant to the present case, and the one which caused me to seek the assistance of the Queen's Proctor—and here I would like to take the opportunity of expressing my indebtedness to Mr. Colin Duncan for all the help he gave.

The petition, having been filed as shortly as seven days after the seven years had elapsed since the wife was last seen alive, the strong probabilities are that this woman, who seems to have had but little natural inclination to collect her maintenance, was alive during, at any rate, the first week of the seven years immediately preceding the petition: indeed any reasonable jury, properly charged as to the ordinary law of inferences, would, if allowed to consider all the relevant matters, certainly come to the conclusion that she was alive during that week (and maybe longer) and thus had been "living" at some time "within" the seven years. It is to be noted, however, that the facts which lead to that conclusion all stem from the wife having been alive seven days before the commencement of that week in the circumstances above set out, and that the conclusion is in no way derived from any fact that occurred after the first day of the seven years.

---

[5] (1840) 9 Car. & P. 681.

[6] Ibid. 683, 684.

[7] (1921) 16 Cr.App.R. 31, 32.

Accordingly, if in relation to a case of mere disappearance, "reason to believe" includes inferences to be drawn from the mere fact that the wife was alive in sound health and in no known danger just before the seven years begins to run, this petitioner fails to bring himself within the beneficial part of subsection (2), that is to say, that part which precedes the words "until the contrary is proved." If, on the other hand, "reason "to believe" can only be produced by aid of evidence as to some matter supervening during those seven years, then the petitioner does bring himself within the beneficial part of that subsection.

If the first of the above two interpretations is the correct one, it means that in practice subsection (2) is of no real use to a petitioner until seven years have elapsed from the date on which the other spouse can, on the normal rules of evidence, be presumed to be dead: for so long, at any rate, as inferences drawn from all the facts known to the petitioner lead to a presumption of fact that that spouse is alive there is "reason "to believe" that he or she is alive—and indeed such reason probably exists until those inferences would lead a properly charged jury to presume the death of that spouse. That in turn would mean that subsection (2), far from being of assistance to a petitioner in mere disappearance cases, would be of severe hindrance to him—because the seven years could not start to run until such date as death could be presumed under the normal common law rules.

Such a result would produce inconvenience and hardship to a petitioner contrary to the apparent intention of the legislature, and would indeed reduce subsection (2) to an absurdity. In that state of affairs I take the relevant rule of interpretation to be well stated by Maxwell on Interpretation of Statutes, where it is set out as follows[8]: "Where the language of a statute, in "its ordinary meaning and grammatical construction, leads to a "manifest contradiction of the apparent purpose of the enact-"ment, or to some inconvenience or absurdity, hardship or "injustice, presumably not intended, a construction may be put "upon it which modifies the meaning of the words, and even "the structure of the sentence."

Accordingly, although the first of the two above interpretations of "reason to believe" originally attracted me both as a matter of grammar and of first impression, I think it should be rejected, unless some strong reason can be shown against adopting the second.

The second interpretation involves construing the critical phrase in a way which tends to exclude from the calculation of "reason to believe" matters occurring before the seven years begin to run, except in so far as those matters are related to others supervening during that period. Accordingly, it became desirable in the course of the argument to consider various sets of facts so as to examine what might be the result of such an exclusion, and, in particular, what harm might that exclusion cause. It is only necessary to refer to two instances.

First, what would be the position where the known facts were that at the beginning of the seven years the other spouse was 25, robust in health and subject to no abnormal risks, but nothing had been heard of him for seven years—facts which might well lead a court to presume that spouse to be alive after the seven years? (compare *Chard* v. *Chard* (*orse. Northcott*),[9] the cases cited therein, and *Parkinson* v. *Parkinson*[10]).

Secondly, what, after seven years of newsless absence, would be the position where an experienced explorer, just before the beginning of the relevant period, had announced that he intended to spend the next 10 years continuously studying the inhabitants of some remote territory with which communication is, even in 1956, impracticable—again a case where the court on common law rules would not presume death as soon as seven years had elapsed?

As I understood his submission, Mr. Colin Duncan sought to persuade me that in the first case there would be, and in the second case there would not be, "reason to believe" that the spouse was alive within the seven years. Whilst appreciating his desire not to exclude from consideration all pre-seven year matters in relation to "reason to believe" in cases where there is no positive evidence of any sign of life in that period, I felt unable to accept the invitation to tread some delicate path by which some pre-seven year matters could be excluded and others not. Such a path did not appear to me to be viable, and so the position as regards the explorer must be further considered on the footing that in relation to "reason to believe" his pre-seven year announcement is a matter excluded from consideration.

---

[8] 10th ed. 229.

[9] Ante 259.

[10] [1939] P. 346, 350–351.

Whether or not Parliament, in relation to subsection (2), gave consideration to such highly exceptional cases as that of the explorer, it yet seems to me that the court would not, in practice, be forced into a decision contrary to the justice of a case. For instance—section 16 (2) is subordinate to section 16 (1) and under subsection (1) the court "may" make a decree—a permissive word which contrasts with the imperative "shall" in section 4 of the same Act: and the court thus has, as Mr. Colin Duncan pointed out, a judicial discretion which enables it to avoid deciding contrary to the justice of a case, even where a petitioner brings himself within the benefit of subsection (2). That, of itself, provides protection for respondents in exceptional cases: so I need not discuss alternative ways in which they may be protected (e.g., whether "absent" in subsection (2) might be construed as "unexplainedly absent"). Suffice it to say that no overriding argument has been adduced before me against the adoption of the second interpretation.

It is, of course, obvious that, in some cases, that interpretation may result in death being presumed for the purposes of a divorce when it will not be presumed for other purposes. Such a result, however, is not merely a likely consequence when a statute sets up a presumption in terms which do not follow that adopted by the common law, but it is a consequence which the preamble of the 1937 Act shows may well have been deliberately intended, and also it is a consequence which Bucknill J. obviously accepted in *Parkinson* v. *Parkinson*[11] in relation to the facts of that case.

Thus, I adopt the second interpretation, which involves construing the critical phrase "the petitioner has no reason to "believe that the other party has been living within that time" as if the legislature had, in substance, said "if nothing has "happened within that time to give the petitioner reason to "believe that the other party was then living"—to adopt the robust paraphrase alternatively put forward by Mr. Duncan after

---

[11] [1939] P. 346, 350–351.

1956

THOMPSON
v.
THOMPSON.

Sachs J.

I had tempted him from more tenuous ways. That gives to the words of section 16 (2) precisely the same meaning throughout as to the parallel ones in section 57 of the 1861 Act—simply substituting as regards matters arising during the seven years a wider class of material than that relevant to "knowledge" within the meaning given to that word in *Rex* v. *Lund*.[12]

The effect is to produce a clean cut and convenient rule. It, in most cases, frees a petitioner from the practical difficulties that attend litigation where the decisive test (see *Ward* v. *Ward* (*orse. Hanson*) [13]) as to whether death should be presumed is the proper inference to draw from the totality of all the wide range of facts that has to be evident when there is no statutory provision. I say "in most cases" because, of course, once positive evidence comes to light tending to show that the other spouse was alive in the seven years, it may well have to be considered in relation to the circumstances that existed before that period began.

Further, the above interpretation results in subsection (2) being held to conform to a pattern adopted by the legislature over some three centuries when enacting convenient rules for presuming that death has occurred at some unspecified point of time within a period of seven years. On each occasion it has been laid down that a presumption of death was to arise upon a seven years' absence unless some positive happening since the beginning of those years provided evidence rebutting that presumption.

Once the above interpretation of the critical phrase is adopted it follows that the petitioner in the present case has brought himself within the beneficial part of subsection (2). He has established a prima facie case that his wife is dead—and on the facts of the case, the contrary not having been proved, he is entitled to the decree which he seeks.

Solicitors: *B. L. Harris & Co.; The Queen's Proctor.*

E. J.

---

[12] 16 Cr.App.R. 31.

[13] Court of Appeal Judgments, 1956, No. 40; The Times, Feb. 10, 1956.

SMYTH *v.* SMYTH.

1956
April 18.

Lord Merriman
P. and
Davies J.

Husband and Wife—Justices—Refusal to adjudicate—Wife's cruelty petition dismissed—Husband's application for discharge of maintenance order—Refusal on ground that matter more conveniently dealt with in High Court—High Court without jurisdiction—Procedure—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 7, 10.

A husband applied to a court of summary jurisdiction for the discharge of a maintenance order based on persistent cruelty on the ground that his wife's petition for divorce alleging the same acts of cruelty had been dismissed by the High Court. The magistrate declined to discharge the order, giving as his reason that the matter could "more conveniently be dealt with by the High Court." On the husband's appeal:—

Held, (1) that, since the High Court had no jurisdiction to discharge a magistrate's order, section 10 of the Summary Jurisdiction (Married Women) Act, 1895,[1] did not apply.

Kendall v. *Kendall* [1952] 2 All E.R. 1038n. and *Perks* v. *Perks* [1946] P. 1; 62 T.L.R. 26; [1945] 2 All E.R. 580 followed.

(2) That although the case was one of a magistrate who had declined jurisdiction which he ought to have assumed, it could be dealt with by way of an appeal to the Divisional Court of the Probate, Divorce and Admiralty Division and was not necessarily to be referred to the Queen's Bench Divisional Court for an order of mandamus.

(3) That on such appeal the court was entitled to exercise its powers under rule 71 (6) of the Matrimonial Causes Rules, 1950, to make the appropriate order, and was not bound to send the matter back to the magistrate with an order to hear and determine.

(4) That, in the circumstances, the order should be discharged.

Per curiam. In any matter where there is concurrent jurisdiction in a court of summary jurisdiction and in the High Court, that is to say, where the matter may be investigated and determined by either court, then, if in the opinion of the court of summary jurisdiction the matter would be more conveniently dealt with by the High Court, the court of summary jurisdiction may, under section 10 of the Act of 1895, refuse to adjudicate, and there is no appeal, subject to the proviso that the High Court may send the matter back if it thinks fit.

---

[1] Summary Jurisdiction (Married Women) Act, 1895, s. 10: "If in the "opinion of a court of summary jurisdiction the matters in question between the parties or any of them "would be more conveniently dealt "with by the High Court, the court "of summary jurisdiction may refuse "to make an order under this Act, "and in such case no appeal shall lie "from the decision of the court "of summary jurisdiction: Provided "always, that the High Court or a "judge thereof shall have power by "order in any proceeding in the High "Court relating to or comprising the "same subject matter as the application so refused as aforesaid, or any "part thereof, to direct the court of "summary jurisdiction to rehear and "determine the same."

APPEAL from a decision of the metropolitan magistrate sitting at the Lambeth Magistrates' Court.

On April 14, 1954, Mr. Wightwick, the metropolitan magistrate sitting at the Lambeth Magistrates' Court, on the complaint of a wife that her husband had treated her with persistent cruelty, found the complaint proved and made an order in her favour accordingly.

On October 11, 1954, the wife filed a petition for divorce, alleging all the acts of cruelty which she had put forward in the court of summary jurisdiction and certain other acts subsequent in time, which was dismissed on November 2, 1955, on the ground that the allegations were not sufficiently proved.

The husband, relying on the dismissal of the identical charges of cruelty by the High Court as fresh evidence within the meaning of section 7 of the Summary Jurisdiction (Married Women) Act, 1895, applied to the metropolitan magistrate on December 28, 1955, to discharge the order of April 14, 1954, on the ground that "the defendant has petitioned for divorce and her petition "has been dismissed." Counsel for the husband was prepared to demonstrate the identity of the two conflicting decisions, but the magistrate stopped him in limine and declined to deal with the matter, stating in his reasons:

"This court found that the wife had established persistent "cruelty and made a separation order accordingly. The High "Court has since found that the wife had not proved cruelty. I "have no means of knowing to what extent, if at all, the finding "of the High Court negatives the finding of this court. I am "therefore of the opinion that the question whether the separation order ought to be discharged can more conveniently be "dealt with by the High Court."

The husband appealed on the grounds: "(1) That the magistrate was wrong in law in dismissing the said application. "(2) That the magistrate was wrong in law in holding that the "case could more conveniently be dealt with in the High Court," and was given leave to appeal out of time.

Basil Garland for the husband. The matters adduced by the wife in support of her petition for divorce consisted of the same charges as formed the basis of the order on the ground of persistent cruelty and certain additional allegations. The dismissal of the petition was, therefore, fresh evidence upon which the magistrate was bound to discharge the order: *Perks* v. *Perks*.[2] The only matters arising between parties in a court of summary jurisdiction which may be referred to the High Court as being capable of being more conveniently dealt with there are those in which the High Court has a concurrent jurisdiction: *Perks* v. *Perks*.[2] The High Court has no jurisdiction to discharge an order of a court of summary jurisdiction and there is no form of procedure by which such a matter can be brought before the High Court.

---

[2] [1946] P. 1; 62 T.L.R. 26; [1945] 2 All E.R. 580.

In the absence of concurrent jurisdiction, section 10 of the Summary Jurisdiction (Married Women) Act, 1895, does not apply, and the provision in that section that no appeal shall lie from the decision of the magistrate is of no effect. Alternatively, if the provision has any effect it must be construed as meaning that no appeal shall lie in a case in which a magistrate makes an order having jurisdiction so to do. The proviso to section 10 supports the construction contended for, since it empowers the High Court, in subsequent proceedings, to direct the court of summary jurisdiction to rehear and determine the issue and is in the place of a right of appeal in cases in which the High Court has jurisdiction to adjudicate upon the same facts.

If the above submissions are correct, it is clear that the magistrate had no jurisdiction to act under the special provision of section 10, and that his refusal to discharge the order was in exercise of exclusive jurisdiction given by the Act of 1895 to courts of summary jurisdiction. A challenge to his refusal is, therefore, rightly made by an appeal to this court under section 11 and not by way of prerogative writ.

Lindsay Cullen for the wife. It is submitted that, in any event, the magistrate was justified in refusing to discharge the original separation order. The only fresh evidence which could have been tendered to the court was a certificate of dismissal of the wife's petition. This court has held, on at least one occasion, that there is a material distinction between a judgment which finds a charge proved and a judgment merely dismissing a charge: *James* v. *James*.[3] This is so even if the issues before the two courts are the same and the evidence is substantially so. An affirmative finding of guilt of a matrimonial offence should prevail against a mere declaration by another court that it is not satisfied on the evidence before it.

Even if the magistrate gave a wrong decision, this appeal cannot be entertained, since the order, by the terms of section 10 of the Act of 1895, under which he expressly acted, is not subject to appeal to this or any other court. If this court assumes jurisdiction to hear this matter on appeal, it must do so under section 11 of the Act, which gives a right of appeal from a magistrate's decision in respect of matters where there is no concurrent jurisdiction although the magistrate purported to act under section 10 in the belief that there was concurrent jurisdiction.

---

[2] [1946] P. 1.

[3] [1948] 1 All E.R. 214.

The petition has been dismissed and it has been submitted by counsel for the husband that there is no power in the High Court to discharge the original order: *Knott* v. *Knott*[4] and *Perks* v. *Perks*.[5] It is submitted that, since the magistrate did not make any decision on the merits of the application, but merely refused to exercise his jurisdiction, a challenge to his dismissal of the application can only be made by way of prerogative writ.

LORD MERRIMAN P. referred to the facts and emphasized that it had been formally admitted that the allegations in the wife's petition included in their entirety all those which had been put forward in the magistrate's court and that, in fact, certain further allegations had been added. His Lordship continued: If I may refer to a case heard by this court, in which I gave the leading judgment, the position as to fresh evidence is precisely covered by *Kendall* v. *Kendall*.[1] That case, like the present, was an attempt by a wife to establish a charge of cruelty, which had succeeded in the magistrates' court and had failed in the High Court, and, perhaps, to show how completely the two cases are alike, I may just read a few lines from my own judgment[2]: "We have looked at the notes of the "evidence taken at the original hearing in 1944. It is quite "clear from those notes, as we now know the wife herself "admitted"—(here I substitute "counsel for the wife")—"that the cruelty then alleged coincided item by item, so far as "was possible, with the cruelty alleged by her in her petition for "divorce on the ground of cruelty, which was dated August 2, "1951. I say 'so far as was possible,' because the last two "paragraphs of her petition contained allegations of incidents "which occurred after the original hearing and so could not have "then been brought before the justices. In every other respect "the charges are identical." Mutatis mutandis every word of that short passage applies, and admittedly applies, to this case. I then went on: "On March 24, 1952, the petition came before "His Honour Judge Stewart, sitting as a commissioner in divorce "at York, and was dismissed on the merits, the learned judge

---

[4] [1935] P. 158; 51 T.L.R. 499.

[5] [1946] P. 1.

[1] [1952] 2 All E.R. 1038n.

[2] Ibid. 1039.

"finding that the charges of cruelty in the petition were not "proved." And then follows this sentence, which, in my opinion, is the crux of the matter: "Thereupon the husband took out this "summons, putting forward, as he was fully entitled to do, the "dismissal of these identical charges as fresh evidence." That, of course, invites one to look at section 7 of the Summary Jurisdiction (Married Women) Act, 1895, which is the foundation of the jurisdiction of a court of summary jurisdiction to discharge an order that it has already made.

Leaving aside the question of variations of amount, which does not arise here, to which three of the words which I am about to read no longer apply, that Act provides that "A court "of summary jurisdiction acting within the city, borough, petty "sessional or other division or district, in which any order under "this Act or the Acts mentioned in the schedule hereto, or either "of them, has been made, may, on the application of the married "woman or of her husband, and upon cause being shown upon "fresh evidence"—(those last three words are those which do not apply to mere questions of amount by later legislation)—"to the satisfaction of the court at any time, alter, vary, or "discharge any such order . . ."

Two things are plain. The jurisdiction, so far as this Act is concerned, is plainly entrusted to what is now called the magistrates' court which made the order, and that court has to be satisfied that good cause has been shown upon fresh evidence. The point in the citation from *Kendall* v. *Kendall*,[3] which I have already read, is that on the authority of the earlier case of *Pratt* v. *Pratt*,[4] a decision of the High Court in the sense contrary to and inconsistent with that originally arrived at by the magistrates' court is fresh evidence, upon which cause may be shown to the satisfaction of the justices that the order ought to be discharged. Moreover, it is important to notice that, so far as I am aware—(and no other jurisdiction has been suggested in the argument before us)—it is that court or any other magistrates' court which by later legislation may be empowered to act—(I am not ignoring that there are certain provisions in that respect)—but it is primarily the justices' court which made the order, to which the jurisdiction to discharge is granted. If authority is necessary for that, we have been reminded that as long ago as *Knott* v. *Knott*,[5] in which, according to the headnote, the rival jurisdictions of the High

---

[3] [1952] 2 All E.R. 1038n.

[4] (1927) 96 L.J.P. 123; 43 T.L.R. 523.

[5] [1935] P. 158; 51 T.L.R. 499.

Court and the magistrates' court were discussed and the method of harmonizing them was discussed, I am reported as saying [6]: "The Divorce Court, he [counsel] argues (rightly, as I think), "has no jurisdiction to set aside the order for maintenance: the "justices alone have that power under the Act of 1895." No authority to the contrary has been cited, and, in effect if not in terms, Mr. Garland has agreed that that is a correct statement of the law. There are other cases in which precisely the same inference may be drawn, and I propose to act on that basis. Indeed, there is the authority of the Court of Appeal in a case which is all-important here, the case of *Perks* v. *Perks*,[7] to which we were referred by Mr. Garland, that, at any rate in matters of what Lord Greene M.R. described as cases of pure maintenance, the High Court has no jurisdiction to discharge, and it is the justices who have it. That, of course, was at a time before the precursor to section 23 of the Matrimonial Causes Act, 1950—section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949—was passed, giving the High Court the same jurisdiction as the justices' court to make an order on the ground of wilful neglect to maintain.

To that extent, and to that extent only, the point which was decided in *Perks* v. *Perks* [7] is distinguishable from that which is being dealt with in this case. In my opinion, though it was necessary, no doubt, for Lord Greene M.R. to qualify his judgment throughout by dealing with the clear case as it was at that time, in which the justices alone had jurisdiction directly to award maintenance, and to distinguish that case from the ancillary right of the High Court to award maintenance in connexion with matrimonial causes, the distinction properly drawn in that case has no real bearing on the matter which is before us, for the essence of the decision was this, that the magistrates' court had and the High Court had not jurisdiction to deal with the discharge of orders.

With that preface, and I will come back again in a moment to *Perks* v. *Perks*,[7] this case was presented to the metropolitan magistrate and was dealt with very summarily. Mr. Garland, who appeared in the case, and, incidentally, had appeared in the divorce suit, has told us, and, of course, we accept it unreservedly, that he was prepared item by item so far as was necessary to show what is now the admitted identity of the facts leading to the two conflicting decisions by the magistrates' court

---

[6] [1935] P. 158, 163.

[7] [1946] P. 1; 62 T.L.R. 26; [1945] 2 All E.R. 580.

1956

SMYTH
v.
SMYTH.

Lord Merriman
P.

and the divorce court on the subject of these allegations of cruelty. That makes it difficult to understand how it comes about that, in his reasons for declining to deal with the matter and saying that it is more convenient that it should be dealt with by the High Court under section 10 of the Act of 1895, the magistrate had "no means of knowing to what extent if at "all, the finding of the High Court negatives the finding of this "court." He began by saying that his court had "found that "the wife had established persistent cruelty and made a separation order accordingly. The High Court has since found that "the wife had not proved cruelty," and then comes the sentence which I have just read. Well, the means were there if he would but have allowed counsel a few minutes in which to expound the subject; but instead he said that he was of opinion that the question whether the separation order ought to be discharged could more conveniently be dealt with by the High Court.

That, of course, involves reference to section 10 of the Act of 1895, which reads as follows: "If in the opinion of a court of "summary jurisdiction the matters in question between the "parties or any of them would be more conveniently dealt with "by the High Court, the court of summary jurisdiction may "refuse to make an order under this Act,"—(and these words are important)—"and in such case no appeal shall lie from "the decision of the court of summary jurisdiction: Provided "always"—(I do not think the proviso matters, but I had better read the whole section)—"that the High Court or a judge thereof "shall have power by order in any proceeding in the High Court "relating to or comprising the same subject matter as the application so refused as aforesaid, or any part thereof, to direct the "court of summary jurisdiction to rehear and determine the "same." Clearly the proviso does not touch the matter of this appeal.

It is argued that that section makes this appeal wholly inappropriate; that we are doing something which the section says we ought not to do. Here is a magistrate who has said that this issue will be more conveniently dealt with in the High Court, and the husband has appealed, and we are hearing the appeal, and I am giving judgment about it at this moment. Well, the question is: What is the scope of section 10? And that is where we come back to *Perks* v. *Perks*.[8]

I need not, for this purpose, refer again to the qualifications which occur in Lord Greene M.R.'s judgment in *Perks* v. *Perks*,[9] which do not apply to this particular case. The point of the decision was that section 10 only applies at all in cases in which there is concurrent jurisdiction to deal with the particular complaint both in the justices' court and in the High Court. Lord Greene M.R. said [10]: "Those words 'more conveniently dealt "'with' alone clearly suggest, to my mind, that the legislature "was considering a case of concurrent jurisdiction and the "question which was the more convenient forum," and then he pointed out,[11] as I have already said, that there were certain matters in which there was concurrent jurisdiction, but pure maintenance was not one of such cases. In fact, as I have already said, and I believe rightly, for no authority has been cited to the contrary, we are not dealing here with a case of concurrent jurisdiction at all. The magistrates' court alone has, and the High Court has not, power to discharge a magistrate's order. Similarly, du Parcq L.J. said [12]: "If there is no existing juris-"diction in the High Court to deal with the matters in question, "then it is wrong to say that those matters may more con-"veniently be dealt with by the High Court." And that is the answer to the whole thing. The metropolitan magistrate was wrong in saying that this matter could be more conveniently dealt with by the High Court, because he was imposing on the High Court, or assuming that the High Court had, a jurisdiction which it had not at all. There was no balance of convenience between the two forums—none. He was the forum which alone could conveniently try the issue, because he alone was the forum which had the jurisdiction.

---

[8] [1946] P. 1.

[9] Ibid. 6.

What, then, is the result on this question of whether this appeal is maintainable? For it has been argued, and it is a formidable argument, of course, that on any view of the matter this is a case of a magistrate who has declined jurisdiction which he ought to have assumed—(assuming I am right so far)—and that, therefore, the case ought to go to the Queen's Bench Divisional Court for an order of mandamus; but the answer to that, I think, is, if my recollection is right, and my recollection has not been challenged in this respect, that the Queen's Bench Divisional Court is very unlikely to grant a mandamus when there is an alternative form of relief.

So that we come back to the question whether this appeal lies, and, if it does, whether we ought not to deal with it. In my opinion, it is implicit in the judgment of Lord Greene M.R.

---

[10] [1946] P. 1, 6.

[11] Ibid.

[12] Ibid. 7.

in *Perks* v. *Perks* that this appeal does lie, for he concludes his judgment in these words [13]—(I need not refer back to the somewhat elaborate order which had been devised by the judge who heard the case, or to the criticism of it which was expressed by Lord Greene M.R.[14]):—" In my opinion, the learned judge had " no jurisdiction to discharge the order, and the matter ought to " have been dealt with by the stipendiary magistrate. The " stipendiary magistrate had no power to issue his so-called " certificate refusing to entertain the application." That was a matter of machinery which I need not enlarge upon. " He " ought to have entertained it and decided it. If either party " had been aggrieved by his decision, there was a right of appeal " under section 11. That is the proper procedure." Section 11 says, and, of course, the opening words are important and are relied upon by Mr. Cullen:—" Save as is hereinbefore pro" vided, an appeal shall lie from any order or the refusal of " any order by a court of summary jurisdiction under this Act " to the Probate, Divorce and Admiralty Division of the High " Court," and then the section goes on to make provision for rules. Of course, if section 10, which is manifestly included in the words " save as is hereinbefore provided," does apply and does otherwise provide, then there is no right of appeal; but if section 10 does not apply then there is a right of appeal because it is not " otherwise hereinbefore provided." And in my opinion it is as plain as possible that section 10 does not apply, for the reason that I have given. Section 10 applies to a conflict of concurrent jurisdictions and not to a case like this where the only jurisdiction lies with the magistrate. But it is said with some force that these sentences [15] " If either party had been aggrieved by his decision "—(that is assuming he had decided the matter)—" there was a right of " appeal under section 11. That is the proper procedure," only apply to the decision Aye or No to discharge the order on the merits. Clearly it applies to that, but I cannot see any reason why it should only apply to that. Supposing he had assumed jurisdiction which he was entitled to assume, he could have decided that the order should have been discharged or that it should not have been discharged. That would have been a decision on the merits which plainly would have given a right of appeal. But here he has refused to make the order for a wrong reason, and dismissed the application, and in my opinion that

[13] [1946] P. 1, 7.
[14] Ibid. 5.
[15] Ibid. 7.

is plainly a matter of appeal which is covered by the exact words of section 11, "the refusal of any order"; that is to say, he has refused to make an order discharging the original order, and as it is not "otherwise provided" that is plainly a matter of appeal under section 11.

In my opinion, therefore, we have jurisdiction to hear this appeal, and, incidentally, now that I have stated my opinion, and assuming that my brother agrees with it, I also say that we have power to extend the time for the appeal, which is out of time, and propose that we do so.

But then, how ought we to deal with it? And this, I am glad to say, is the last question which arises in this somewhat lengthy judgment. It is said that we ought to send it back to the magistrate, and that we, instead of the Queen's Bench Division, ought to order him to hear and determine. I do not think that is necessary. I have referred to the fact that section 11 empowers the rule-making authority, now the Supreme Court Rules Committee, to make rules in these matters, and we have made rules, and one of them covers appeals from courts of summary jurisdiction. That is rule 71, and in sub-rule (6) it says "The "Divisional Court may draw all inferences of fact which might "have been drawn in the court below and"—these are the important words—"may give any judgment and make any order "which ought to have been made."

In my opinion it is as plain as anything can be that the magistrate ought to have made the order that the husband's complaint was proved to his satisfaction and that the original order should be discharged. As he has failed to make that order, in my opinion we have the power to make it, and I propose that we should do so.

DAVIES J. I agree, and would add only a few words on one point, namely, whether or not an appeal lies to this court from the refusal of the metropolitan magistrate to adjudicate upon the husband's application to discharge the original order.

As I read section 10 of the Act of 1895, the effect of it is that in any matter where there is concurrent jurisdiction in a court of summary jurisdiction and in the High Court, that is to say, where the matter may be investigated and determined by either court, then, if in the opinion of the court of summary jurisdiction the matter would be more conveniently dealt with by the High Court, the court of summary jurisdiction may refuse to adjudicate. In such a case—a case falling within the ambit of the section—there is to be no appeal from the judicial exercise of its discretion by the court of summary jurisdiction, subject to the proviso that the High Court, in its turn, if it thinks that the matter is more suitable for a court of summary jurisdiction, may send it back.

But all this presupposes that the matter is one within the jurisdiction of the High Court. If, as in the present case, the matter is not within the jurisdiction and competence of the High Court at all, then, in my judgment, section 10 never comes into play. That being so, the special prohibition of appeals against what I have described as the discretionary order which may be made under the section can have no application either, and, as my Lord has said, the matter remains at large under the general provisions of section 11, which provides that an appeal shall lie from, amongst other things, any refusal of an order by a court of summary jurisdiction.

I have thought it right to add this because, if I may say so with respect, although the concluding sentences of the judgment of Lord Greene M.R. in *Perks* v. *Perks* [16] are plainly wide enough to cover the present situation, I, for myself, doubt whether Lord Greene M.R. in that case was contemplating an appeal on a point like the present one; he may well have been thinking of an appeal from an actual decision on the merits one way or the other as between a husband and a wife on an application to discharge. The result is the same, of course, though arrived at on a perhaps narrower ground.

I do not desire to add anything else, and I agree, apart from that, with everything that has fallen from my Lord, and that this appeal should consequently be allowed and the original order be discharged.

LORD MERRIMAN P. The formal order will be: Time extended, appeal allowed, the order of dismissal set aside and an order made on the husband's complaint that the order of April 14, 1954, be discharged as from December 28, 1955. Both legally aided. No party and party costs.

Appeal allowed.
Order discharged.

Solicitors: *Lewis & Shaw*; *Kearton & Co.*

E. J.

---

[16] [1946] P. 1.

1956
Feb. 20, 21,
23, 24;
Mar. 16.

Lord
Merriman P.
and
Collingwood J.

BROWN *v.* BROWN.

Husband and Wife—Divorce—Conduct conducing—Husband's adultery—Wife's improper association resulting in loss of affection for husband—Incapable of amounting to conduct conducing—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 11.

Husband and Wife—Justices—Adultery—Conduct conducing.

A wife complained to justices that her husband had committed adultery. The husband alleged that her loss of interest in and affection for him resulting from her association with another man, with whom the wife admitted she was infatuated, had conduced to his adultery. The association had not come to the husband's knowledge until after he had committed adultery and he had attributed the wife's lack of affection, manifested in her coldness in sexual matters, to fear of childbirth. He had, however, on one or two occasions asked her if she had been out with anyone, which she had denied.

The justices held that the wife's lack of affection and interest had resulted from her improper association with the other man and dismissed her complaint on the ground that her misconduct had conduced to the husband's adultery, or, in the alternative, that they were not satisfied that it had not done so.

On the wife's appeal from this decision:—

Held that, in view of the justices' finding that the wife's improper association with another man was the cause of the loss of affection for and interest in the husband, there was no break in the chain of causation between the association and the state of the husband's mind when he committed adultery although he did not, at that time, know of the association; even assuming, however, that the husband suspected more than he knew and was affected by what he suspected, to hold that behaviour of the wife giving rise to a bare suspicion of an improper association, though that suspicion subsequently proved to be justified, was capable, in law, of amounting to misconduct conducing would be going much further than was warranted by any previous decision and the appeal should, therefore, be allowed.

Cox v. *Cox* (1893) 70 L.T. 200 distinguished.

Per curiam. Since desertion was clearly a graver matrimonial offence than refusal of sexual intercourse, it was not clear, on principle, how refusal of sexual intercourse could, but desertion could not, amount to misconduct conducing.

Weatherley v. *Weatherley* [1947] A.C. 628; 63 T.L.R. 209; [1947] 1 All E.R. 563; *Callister* v. *Callister* [1947] W.N. 221; 63 T.L.R. 503 and *Richards* v. *Richards* [1952] P. 307; [1952] 1 T.L.R. 1321; [1952] 1 All E.R. 1384 considered.

APPEAL by a wife from the Great Yarmouth justices.

The following statement of facts is taken from the judgment of the court.

A wife applied to the justices under section 11 (1) of the Matrimonial Causes Act, 1937,[1] for an order on the ground of her husband's adultery. At the hearing of her complaint on November 2, 1955, the husband admitted the adultery charged but alleged that the wife's misconduct had conduced thereto.

The evidence was that the parties were married on September 19, 1953. They lived together in Nottingham, where both were employed—the husband in the confectionery trade, in connexion with which he was working for an examination. During the first year of married life all went well. In the spring of 1955 the wife began an association with one Morley, a fellow employee whom she had known for some 12 months. She said that she went out with him on some Thursdays and Saturdays, but not every week—only when her husband did not want her to go out with him. She stated that her husband did not seem to bother about her, and she was left to go out on her own. The husband agreed that his time was taken up with riding his motor-bicycle and reading for his examination, and that he told his wife that she could go out on her own. He said that he took her out usually on Saturday and Sunday. Once or twice, he said, he asked her if she had been out with anyone, to which she replied "No." He stated, however, that he noticed a change in his wife's attitude towards him; that their relations were not what they had been during the first year of marriage. He said that his wife was not interested in him, and neglected him, so that on occasions he had to get his own meals. As regards sexual intercourse, he said she became cold; that it was not "love"; and that she said that she regarded it as a form of duty on her part.

In cross-examination he said that he attributed this recent coldness to intercourse on her part to fear of childbirth; that he therefore took every precaution against her having a child, and that he thought it would eventually right itself. He said that he did not know of any other man in her life.

---

[1] Matrimonial Causes Act, 1937, s. 11: "(1) Among the grounds on "which a married woman may apply "to a court of summary jurisdiction "under the Summary Jurisdiction "(Married Women) Act, 1895, for "an order or orders under that Act "there shall be included the ground "that her husband has been guilty "of adultery. . . . (3) On any "application made by virtue of this "section, the court shall not make "an order unless it is satisfied that "the applicant has not condoned or "connived at, or by his or her wilful "neglect or misconduct conduced to, "the adultery, and that the application is not made or prosecuted in "collusion with the other party to "the marriage or any person with "whom it is alleged that adultery "has been committed."

1956

BROWN
v.
BROWN.

The parties were friendly with a Mr. and Mrs. Alsop, Mr. Alsop working in the same employment as the husband, who introduced them to the wife. From August 20 to September 3, 1955, Alsop was away for a fortnight's army training; in the meantime Mrs. Alsop stayed with her mother.

On Monday, August 23, 1955, Mrs. Alsop came to the home of the parties, and the husband took her to the bus stop. On Thursday, August 26, 1955, she came again, and the husband took her home on his motor-cycle. The wife said that during the following week he was out every night. On Monday, September 5, 1955, Alsop came and challenged the husband about his conduct with his (Alsop's) wife, saying that his wife had confessed to him. The husband thereupon admitted that he had committed adultery with Mrs. Alsop on two occasions: on Wednesday, August 31, 1955, on an embankment after they had attended a football match together, and on Friday, September 2, 1955, in the country. Following upon this confession of adultery by the husband, the wife thereupon disclosed to him, for the first time, her association with Morley—of whose existence the husband had hitherto been unaware. Subsequently Morley came to the house, and the wife then expressed her love for Morley (in her evidence qualified as "perhaps infatuation").

The only evidence of the extent of the wife's association with Morley was that provided by the wife herself, viz., that she had kissed him goodnight; that she thought of telling her husband many times, as it worried her; that she was ashamed of what she had done. She denied, in evidence, that she had committed adultery with him, and asserted that this association did not affect her behaviour to her husband, and that she was doing her best to keep it from him. The husband nowhere suggested that he suspected adultery by his wife, although he may have sensed that all was not well.

With regard to his own adultery with Mrs. Alsop, he said in evidence: "I can only say *it* was lack of affection on my wife's "part. There were signs of my marriage coming to an end "before I went with Mrs. Alsop." It was conceded by counsel for both parties that "it" in this context meant "the cause of "my adultery."

At the conclusion of the hearing the justices held that the wife's misconduct had conduced to the husband's adultery but that, in the alternative, even if that were not proved, they were very far from satisfied that the wife had not by her wilful neglect or misconduct conduced to the adultery and that they were, therefore, debarred by section 11 (3) of the Act of 1937 from making an order.

The crucial sentence of the justices' reasons for their decision was as follows: "We have no doubt that this evident loss of "the wife's affection and interest conduced to the husband's "adultery, and we are satisfied that it" (which was conceded by counsel for both parties to mean the evident loss of the wife's affection and interest) "was due to the association of the wife "with another man, which, whether or not adulterous, was "improper, and so (notwithstanding the husband's ignorance of "it) constituted misconduct." The word "it" on the second occasion was conceded to mean the association.

From the justices' order dismissing her complaint the wife appealed.

K. Bruce Campbell for the wife. There was no suggestion that the wife in this case had committed adultery. The highest at which her misconduct can be put is that, as a result of an improper association with another man of which her husband was not aware, her affection for the husband cooled. It is submitted that such conduct cannot, in any event, be capable of amounting in law to misconduct conducing to adultery. It fell far short of a wilful refusal of sexual intercourse, and it is not clear that misconduct of even that degree amounts to misconduct conducing to adultery: *Synge* v. *Synge*[2] and *Rowe* v. *Rowe*.[3] It is true that in *Callister* v. *Callister*[4] wilful refusal on the part of a wife was held to amount to misconduct conducing to adultery, but that was conduct which had endured for some 11 years.

[Lord Merriman P. Is there any authority for the proposition that an improper association falling short of adultery cannot amount to misconduct conducing?]

There is none. *Plows* v. *Plows*[5] was another case in which wilful refusal was held to amount to misconduct conducing to adultery, but in that case the refusal had been from the beginning of the marriage.

[*J. D. F. Moylan.* It will be submitted for the husband that *Cox* v. *Cox*,[6] in which misconduct short of adultery was held to be capable of amounting to misconduct conducing, is a complete answer to the present appeal.]

---

[2] [1900] P. 180; 16 T.L.R. 388.

[3] (1865) 4 Sw. & Tr. 162.

[4] (1947) 63 T.L.R. 503.

[5] (1928) 44 T.L.R. 263.

[6] (1893) 70 L.T. 200.

That was a decision upon the pleadings at an interlocutory stage. It was an application that certain allegations that a husband's association with another woman amounted to misconduct conducing should be struck out. All that had to be shown to resist that appeal was that the allegations were not immaterial or frivolous. Further, in *Cox* v. *Cox*[6] the association was one which was well known to the wife.

[Lord Merriman P. Do you say that although a refusal of sexual intercourse may be operative in bringing about adultery the coolness of the wife in the present case could not be so because, although the husband knew that something was wrong, he did not know what, and that it could not amount to misconduct conducing if the husband merely suspected the cause?]

Yes. If it were otherwise it could be said that where a perfectly decent and respectable married woman falls in love with another man but carries on and does her best with her marriage her husband has a licence to commit adultery simply because she feels, as she is bound to, a little cooler towards him.

[Lord Merriman P. Are you saying that a wife's reaction to her own guilty conscience cannot be misconduct conducing?]

Not in the circumstances just referred to. If the husband left her in such circumstances he would be guilty of desertion. *Dering* v. *Dering and Blakeley*[7] shows that a spouse to be guilty of misconduct conducing must have been able to perceive the danger of adultery and have acted in reckless disregard of it. *Lankester* v. *Lankester and Cooper*,[8] in which a husband acquiesced in divorce proceedings taken by the wife in the United States of America, proceedings which subsequently proved not to be valid in England, so that she could marry another man, is an example of conduct which could properly be regarded as misconduct conducing. Similarly in *Hughes* v. *Hughes*,[9] in which it was pleaded that a wife had treated her husband with insolence and neglect and had defied him and frequently absented herself from the home and had eventually withdrawn herself from cohabitation without reasonable cause for a period of two years. [The cases cited in Rayden on Divorce in which misconduct conducing was found were referred to.[10]] The conduct of the wife in the present case fell far short of any of the examples given. It also fell short of desertion which, in *Richards* v. *Richards*,[11] was held not to amount to misconduct conducing, and the proposition which was applied against the deserted wife in that case, that her adultery had resulted from her own personality and conduct, applies also to the husband in the present case.

---

[6] 70 L.T. 200.

[7] (1868) L.R. 1 P. & M. 531.

[8] [1925] P. 114; 41 T.L.R. 594.

[9] (1866) L.R. 1 P. & M. 219.

[10] 6th ed., p. 198.

[11] [1952] P. 307.

If the decision of the justices is right the consequence is that if a wife becomes cooler to her husband, whatever the cause, she cannot complain of any adultery which he may commit. She must either condone it or become a deserter. Even if it could be said, which is not admitted, that the husband's adultery in the present case would never have taken place had it not been for the change in the wife's attitude, and that such conduct is capable of amounting to misconduct conducing, it is submitted that it did not, in fact, conduce to or cause the adultery committed by the husband. To conduce to adultery the misconduct must be a necessary or proximate cause (*Parry* v. *Parry* [12]), or must be closely and directly connected with it: *Richards* v. *Richards*.[13] If the conduct of the wife in this case did conduce to the adultery of the husband it must be possible to say that the mere manifestation of her lack of interest and affection was a causa causans of the adultery. In this respect the case now under consideration is akin to *Cunnington* v. *Cunnington and Noble*,[14] in which it was held that although the adultery of the wife would in all probability never have taken place had it not been for the husband's conduct leading to his imprisonment, nevertheless that conduct was a causa sine qua non and neither directly nor indirectly a causa causans.

J. D. F. Moylan for the husband. The justices made their findings as to the conduct of the wife and the question is whether that conduct amounts to wilful neglect or misconduct within the meaning of the Matrimonial Causes Act, 1937, s. 11, which sets up misconduct conducing as an absolute bar to a party seeking an order on the ground of adultery. The misconduct must, as a matter of fact, be such as to cause or bring about the husband's adultery. It need not be the sole cause: see *St. Paul* v. *St. Paul and Farquhar*,[15] in which it was said, in referring to the existence of misconduct conducing, that the adultery of the one spouse must have been very much brought about or very much helped forward by the conduct of the other, and this was referred to and adopted in *Cox* v. *Cox*.[16] *Callister* v. *Callister*,[17] *Plows*

---

[12] [1896] P. 37; 12 T.L.R. 126.

[13] [1952] P. 307; [1952] 1 T.L.R. 1321; [1952] 1 All E.R. 1384.

[14] (1859) 1 Sw. & Tr. 475.

[15] (1869) L.R. 1 P. & M. 739.

[16] 70 L.T. 200.

[17] 63 T.L.R. 503.

v. *Plows*[18] and *Dixon* v. *Dixon*[19] all held that a wilful refusal of sexual intercourse can amount to misconduct conducing. It is true that *Richards* v. *Richards*[20] held that desertion cannot amount to misconduct conducing and that this decision apparently conflicts with those referred to above. *Synge* v. *Synge*[21] was not referred to in *Richards* v. *Richards*,[22] but it has been overruled by *Callister* v. *Callister*[23] and *Plows* v. *Plows*.[24] The only way in which it is possible to reconcile the apparent conflict is by saying that a spouse who leaves the other does not conduce to his adultery but a spouse who, more tantalizingly, remains and refuses sexual intercourse may be guilty of misconduct conducing.

As to whether the adultery was caused by the wife's misconduct, the phrase "closely and directly connected" used by Denning L.J. in *Richards* v. *Richards*[25] does not mean that the misconduct must have been a causa causans; one simply has to look and see whether it brought about the adultery. Denning L.J. is not saying that indirect causes cannot amount to misconduct conducing. He refers to *Parry* v. *Parry*[26] and does not disagree with what Gorell Barnes J. said there[27] as to misconduct conducing varying greatly in degree. He is not saying in *Richards* v. *Richards*[28] that desertion was an indirect cause of the husband's adultery; he is merely saying that was not the cause. One is not obliged to ask whether the misconduct was the direct or immediate cause; it is sufficient if it is the cause. Misconduct may conduce to adultery even if it is not the direct cause and there is an interposition of a link or two in the chain of causation. Although there were intervening causes in the present case, for instance, the parties' friendship with the woman with whom the husband eventually committed adultery and the fact that her husband was away at the crucial period, the final and effective cause was the wife's association with the other man.

[LORD MERRIMAN P. Does not the fact that this was unknown to the husband at once introduce a doubt that it was an effective cause?]

The husband's case can be put this way: the wife, through her infatuation, lost all affection for the husband; the natural and probable result was that he committed adultery, and he said that that was the reason for his so doing. When he discovered the existence of the association he was entitled to say, "Now I can "see what caused the whole thing"; and one can fairly say that the association brought about the adultery although the husband did not know of it. The conduct of the wife in the present case is to be distinguished from the sort of conduct which was held not to amount to misconduct conducing in *Cunnington* v. *Cunnington and Noble* [29] and in *Richards* v. *Richards*,[30] for it was conduct within the matrimonial sphere, and it was misconduct because it sprang from a guilty origin and that was so irrespective of the husband's knowledge.

---

[18] 44 T.L.R. 263.
[19] (1892) 67 L.T. 394.
[20] [1952] P. 307.
[21] [1900] P. 180.
[22] [1952] P. 307.
[23] 63 T.L.R. 503.
[24] 44 T.L.R. 263.
[25] [1952] P. 307, 310.
[26] [1896] P. 37; 12 T.L.R. 126.
[27] [1896] P. 37, 40.
[28] [1952] P. 307.

[LORD MERRIMAN P. Is there any authority for the proposition that knowledge of the other party's adultery can amount to misconduct conducing?]

The only cases which offer any authority for that proposition are cases in the Divorce Division in which the court had to consider whether the conduct of the respondent justified the exercise of its discretion in respect of the petitioner's adultery. In certain of these cases part of the respondent's misconduct consisted of adultery, for instance, *Symons* v. *Symons*,[31] in which it was held that a husband's cruelty, desertion and adultery amounted to misconduct conducing to the petitioner's adultery.

[*K. Bruce Campbell.* In the paragraphs of his judgment [32] commencing "Thirdly" and "Fourthly" Sir Francis Jeune P. found knowledge of the husband's adultery, which distinguishes it from the present case.]

In *Constantinidi* v. *Constantinidi and Lance* [33] the wife's desertion of the husband and association with another man, with whom she subsequently entered into a bigamous marriage, preceded the husband's adultery, and Sir Francis Jeune P. held [34] that her misconduct had conduced to the husband's adultery, and granted him a decree. In the later case of *Constantinidi* v. *Constantinidi and Lance*,[35] which came before the Court of Appeal on the question of variation of settlements, it would appear that Stirling and Cozens-Hardy L.JJ. thought that the wife's conduct would amount to misconduct conducing. [Reference was also made to *Tickner* v. *Tickner*,[36] *Evans* v. *Evans and Elford* [37] and *Wyke* v. *Wyke*.[38]] *Bethel* v. *Bethel and Brown* [39] shows that adultery with other misconduct can amount to misconduct conducing.

---

[29] 1 Sw. & Tr. 475.

[30] [1952] P. 307.

[31] [1897] P. 167; 13 T.L.R. 353.

[32] [1897] P. 167, 173, 174.

[33] [1903] P. 246; 19 T.L.R. 699.

[34] [1903] P. 246, 261.

[35] [1905] P. 253.

[36] [1924] P. 118; 40 T.L.R. 367.

[37] [1906] P. 125.

[38] [1904] P. 149.

[39] (1947) 63 T.L.R. 387.

To sum up: (1) There is no clear-cut authority to the effect that adultery can of itself amount to misconduct conducing to adultery, but it is implicit that it can so do. (2) Although there is no direct authority to this effect, it appears that a reasonable belief that adultery has been committed can amount to misconduct conducing on an analogy with *Glenister* v. *Glenister*.[40] (3) A reasonable belief that a wife has transferred her affections from her husband to a paramour can amount to misconduct conducing to the husband's adultery even though the wife has not committed adultery and the husband does not believe that she has: *Constantinidi* v. *Constantinidi and Lance*[41] and *Cox* v. *Cox*.[42] (4) It is wrong to classify conduct into certain types which can amount to misconduct conducing and other types which cannot. The only two tests for the existence of misconduct conducing as a matter of law are (a) was there conduct which amounted to misconduct, (b) it must be the cause or one of the main causes of the adultery in question. The references to direct cause which appear in the cases are not intended to lay down, as a matter of law, a distinction between direct causes which can amount to misconduct conducing and indirect causes which cannot. The point in all the cases is that to amount to misconduct conducing it must be found that the misconduct has brought about the adultery. The use of the phrase "direct "cause" is intended to draw attention to the importance of that proposition and to the importance of disregarding circumstances which, although they may have preceded the adultery in time and be part of the surroundings in which the adultery occurred, are not in fact causes of it. (5) Although the effect may be linked with the cause by some intervening circumstance, the question is whether the intervening circumstance is such as to make the preceding conduct a sine qua non or such that it remains a causa causans. That is a matter of fact to be decided on the circumstances of each particular case.

K. Bruce Campbell in reply. Nothing of such a slight nature as the conduct of the wife in this case has ever before been held to amount to misconduct conducing to adultery. It is not conceded that adultery per se is necessarily misconduct which conduces to the adultery of the other spouse; it might be different if the adultery were accompanied by other circumstances, for instance, the shock of a sudden discovery. The class of conduct which may amount to misconduct conducing is very wide and each case must be considered upon its individual circumstances, with particular regard to whether the adultery was caused or brought about by the misconduct of the other party. The court has to attempt to examine the state of mind of the adulterous party at the time of the adultery in order to ascertain whether he was impelled by the misconduct of the other spouse or by his own inclination.

---

[40] [1945] P. 30; [1945] 1 All E.R. 513.

[41] [1903] P. 246.

[42] 70 L.T. 200.

The original conception of misconduct conducing to a wife's adultery was that of abandoning the wife and driving her of necessity into the arms of another man or, where it was alleged by the husband, wilful refusal of sexual intercourse. In many cases misconduct of a much graver nature than that alleged against the wife in the present case has been held not to amount to misconduct conducing, for instance, *Wyke* v. *Wyke*,[43] in which the husband was guilty of frequent acts of cruelty and of incestuous adultery. It is conceded that the Court of Appeal held that the conduct alleged in *Cox* v. *Cox*[44] was capable in law of amounting to misconduct conducing, but the facts of that case were completely different from those of the present, in which the husband had no certain knowledge of the wife's association. For this reason the association is too remote to be a cause of his adultery, and the loss of affection is conduct which is not capable of conducing to adultery. Misconduct conducing to adultery cannot be trifling; it must be of a very substantial nature.

Cur. adv. vult.

Lord Merriman P., reading the judgment of the court, said: The wife's complaint was brought by virtue of section 11 (1) of the Matrimonial Causes Act, 1937, which section remained unrepealed by the Matrimonial Causes Act, 1950. The first subsection provided as an additional ground on which a married woman could apply to a justices' court for an order under the Summary Jurisdiction (Married Women) Act, 1895, the fact that her husband has been guilty of adultery. The corresponding right is given to the husband by subsection (2). But by subsection (3) it is enacted that on any application made by virtue of this section the court shall not make an order unless it is satisfied, amongst other things, that the applicant has not, by his or her wilful neglect or misconduct, conduced to the adultery.

---

[43] [1904] P. 149.

[44] 70 L.T. 200.

1956

BROWN
v.
BROWN.

The husband admitted the adultery charged, but he alleged that his wife's misconduct had conduced thereto.

The case has been very well argued by counsel on both sides, and we are satisfied that all the relevant authorities have been cited. If we do not refer to many of these authorities it is because the argument has shown that in many respects there is little difference of opinion.

It is to be observed at the outset that in the Divorce Court throughout the series of Matrimonial Causes Acts, now consolidated in the Act of 1950, misconduct conducing to adultery has never been more than a discretionary bar to the relief of divorce, and the effect of section 14 (1) of the Matrimonial Causes Act, 1950, replacing section 5 of the Act of 1937, is that it also affords a discretionary bar to the relief of judicial separation. In a justices' court, on the other hand, misconduct conducing to adultery is made, by section 11 (3) of the Act of 1937, an absolute bar to the making of an order which, if a non-cohabitation clause is included, has the same effect as a decree of judicial separation: Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*a*).

Moreover, the onus of satisfying the court that his or her misconduct has not conduced to the adultery charged is placed on the complainant, as in the case of the absolute bars to relief upon a petition for divorce.

In this case the justices have found affirmatively that the wife's conduct did conduce to the husband's adultery; but, alternatively, they say that even if the evidence would not amount to positive proof that the husband's adultery was conduced to by the wife's misconduct, they are "very far from "satisfied that the applicant had not, by her wilful neglect or "misconduct, conduced to the adultery." Accordingly, on the advice of their clerk, they held that they were debarred from making an order in favour of the wife by section 11 (3) of the Act of 1937.

The effect of placing the onus of satisfying the court of the negative in connexion with the absolute bars to a decree of divorce is discussed in *Churchman* v. *Churchman*,[1] where reliance is placed on what was said by Lord Dunedin in *Robins* v. *National Trust Co.*,[2] to which may be added what was said by Lord Thankerton in *Watt* (*or Thomas*) v. *Thomas*,[3] when, relying on the same case,[4] he said[5]: " . . . as has often been pointed out, " no question of burden of proof as a determining factor of the " case arises on a concluded proof, except in so far as the court " is ultimately unable to come to a definite conclusion on the " evidence, or some part of it, and the question will arise as to " which party has to suffer thereby."

---

[1] [1945] P. 44, 52; 61 T.L.R. 464; [1945] 2 All E.R. 190.

[2] [1927] A.C. 515, 520; 43 T.L.R. 243.

[3] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582.

Since the justices may be said, in one limb of their reasons, to have come to a determinate conclusion that the husband's adultery was conduced to by the wife's misconduct, it might appear that the onus no longer matters, and can be disregarded. But we agree with Mr. Moylan's argument that the justices' judgment ceases to be determinate because it is in an alternative form, and therefore the husband is entitled to succeed in defeating the wife's complaint if the facts warrant reliance on the onus as a determining factor of the case.

But whether the matter falls to be decided on the positive finding, or upon the onus of proof, the essential question still remains: whether the wife's misconduct is capable, in law, of amounting to " conduct conducing "—as it will, for the sake of simplicity, be referred to throughout this judgment—to the husband's adultery.

[His Lordship referred to the facts as set out above and continued:] The husband's allegation in substance, therefore, is that the complete change for the worse in the sexual relations of the spouses was merely the outward and visible manifestation of a change of heart, amounting to distaste and coldness, on the part of the wife towards himself, arising directly out of her improper association with Morley.

Throughout this judgment we use the justices' phrase " loss of " affection and interest " as a short, if incomplete, description of the husband's complaint. They couple with this phrase the epithet " evident," which is plainly intended to convey that the husband was conscious of it and was affected by it. To be more specific, it appears that the justices use the phrase " loss of " affection " with particular reference to the manner in which the wife's sexual life with her husband was, as they find, very materially affected, and the phrase " loss of interest," more generally, in connexion with other matters such as his examinations and his driving test.

[His Lordship referred to the crucial sentence of the justices' reasons as set out in the facts, and continued:] In our opinion, although the association was rightly held to be improper, the justices went rather too far in using the words "whether or not "adulterous," inasmuch as at the bottom of the preceding page of their reasons they said explicitly "there is no evidence that "the wife had herself committed adultery with Albert Morley"; albeit they quote passages, already referred to, from her evidence in support of their view of the improper lengths to which the association had gone.

---

[4] [1927] A.C. 515.

[5] [1947] A.C. 484, 487.

We accept unreservedly the finding of the justices about the impropriety of the association, and we reject the argument put forward by Mr. Campbell that if loss of affection and interest is held to be conduct conducing to adultery, no spouse would be safe from the stigma of conduct conducing when the ardour of early married life abates in the course of time. Manifestly, no question of guilt would be involved in a natural change of attitude of that character. Moreover, considerations of that kind would involve an impossible assessment of the extent to which diminution of affection in that respect was or was not a natural reaction to a corresponding diminution in the other spouse, and so forth.

In our opinion, the husband is entitled to rely on a finding, from which we are not prepared to differ, that the wife's association with Morley was improper, and that it constituted misconduct to the husband, notwithstanding his ignorance of it.

This brings us to the question whether this misconduct is such as to be capable in law of amounting to conduct conducing.

Both counsel adopted the view that the correct approach to the question whether or not conduct conduces is to ascertain whether the conduct alleged to conduce to the adultery in question is misconduct, and whether it is the cause of the adultery. Nor was it sought to draw any distinction between the various epithets which have from time to time been attached to the word "cause" (e.g., "the main causes," *per* Sir Francis Jeune P. in *Symons* v. *Symons*,[6] and the catalogue of epithets given by Lord Sumner in *British Columbia Electric Railway Co.* v. *Loach*,[7] see also Lord Wright in *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[8]) or between such phrases as that the conduct must "bring about" the adultery, or be "closely and directly connected with" it: see *Herod* v. *Herod*[9] and *Richards* v. *Richards*,[10] *per* Denning L.J.[11]

---

[6] [1897] P. 167; 13 T.L.R. 353.

[7] [1916] 1 A.C. 719, 727.

[8] [1940] A.C. 997, 1003; 56 T.L.R. 893; [1940] 3 All E.R. 405.

[9] [1939] P. 11, 21; 54 T.L.R. 1134; [1938] 3 All E.R. 722.

[10] [1952] P. 307; [1952] 1 T.L.R. 1321; [1952] 2 All E.R. 1384.

[11] [1952] P. 307, 310.

Accepting the above test, Mr. Moylan argues with considerable force that there is no break in the chain of causation between the wife's improper affair with Morley and the commission of adultery by the husband. He admitted, of course, that the husband did not know that the wife was having an affair with Morley, and that he did not even know that there was such a person until, after his confession of his own adultery to the wife, she told him about the affair. She then made it clear, however, and the justices so find, that she wanted Morley and meant it, saying amongst other things that he and she were in love. But though the husband did not know about this affair, Mr. Moylan argues that it is clear that he was not in a state of total ignorance: on the contrary, he plainly suspected that something was going on, though he did not know to what extent or with whom. He argues that the husband's lack of knowledge does not interrupt the chain of causation. Although he admits that the husband's case would be stronger if he had actually known what was going on between the wife and Morley before he committed adultery, he submits that the lack of knowledge is not fatal to his case, because the justices have found that the association with Morley caused the loss of affection and interest, and they accept the husband's evidence that she ceased to be interested in him, and that her affection was not there.

There is ample evidence to support this finding. Indeed, it would be strange if it were not so. The wife said that her behaviour towards her husband was "exactly as it was before," and in this we think there is no doubt that she was speaking of their sexual relations, as well as of other aspects of their married life. But, as already stated, she admitted that she was ashamed of what she had done, that she had thought of telling her husband lots of times, and that it worried her. In plain English, she had a guilty conscience, and was afraid to tell her husband. It is not surprising that the justices did not accept her evidence that this did not affect her attitude towards her husband, not least in their sexual relations.

It is perfectly natural, if not inevitable, that the husband sensed that there was something wrong, and the wife admits that on two occasions at least he asked her point blank whether she was going out with someone else.

We feel no difficulty in holding that there was no break in the chain of causation between the association and its impact on the husband's mind and feelings. But this still leaves open the question whether his alleged reaction to the affair was justified.

1956

BROWN
v.
BROWN.

In other words, whether the association or its impact on the husband, taken at its highest, is capable in law of amounting to conduct conducing to his adultery.

It is not easy to reconcile all the cases on conduct conducing. To take, for example, refusal of sexual intercourse, to which substantially the same considerations as those to which we have just alluded in relation to loss of affection apply, so that cases in which the refusal is deliberate and unjustified, and can be traced directly to an illicit affair, differ in material respect from cases in which refusal or cessation of intercourse is due to reasons of health, advancing years, and the like. There is, however, a considerable conflict of authority on this subject. Sir Francis Jeune P. held that the wilful refusal of sexual intercourse for a protracted period was not conduct conducing to the husband's adultery (*Synge* v. *Synge*[12]). On the other hand, in 1928, Lord Merrivale P. held the contrary in *Plows* v. *Plows*,[13] a case of wilful refusal to consummate, followed by desertion; and, nearly 20 years later, in *Callister* v. *Callister*,[14] a Court of Appeal, over which Bucknill L.J. was presiding, decided that the refusal of intercourse by a wife for 11 years was clearly conduct conducing to the husband's adultery, and held, referring to *Herod* v. *Herod*,[15] that it would be difficult to say that the husband's adultery was good cause for the wife's deserting him.

This passage was cited with approval by Denning L.J. in *Richards* v. *Richards*,[16] yet in that case it was held that where there is desertion and nothing more, adultery on the part of the wife "is not due to the desertion, but is due to her own weakness "of character, or, as no doubt she would prefer to put it, because "she fell in love with another man."

This is substantially the same reasoning as that of Sir Francis Jeune P. in relation to the refusal of sexual intercourse (*Synge* v. *Synge*[17]). Other judges have expressed much the same view. We do not doubt that in using the phrase "desertion and nothing more" Denning L.J. meant to exclude cases of constructive desertion, for it is easy to imagine expulsive words or other expulsive conduct which might very well be held to conduce to adultery. However that may be, desertion in the nature of things almost invariably involves total deprivation of sexual intercourse, in addition to comprising the wider intention permanently to disrupt the marriage, although it is well settled that the refusal of sexual intercourse does not by itself constitute desertion (*Weatherley* v. *Weatherley* [18]). Thus, desertion is clearly a graver matrimonial offence than refusal of sexual intercourse; and, if the greater includes the less, it is not altogether clear, on principle, how it is that refusal of sexual intercourse can, but desertion cannot, amount to conduct conducing.

---

[12] [1900] P. 180, 207; 16 T.L.R. 388.

[13] (1928) 44 T.L.R. 263.

[14] [1947] W.N. 221; 63 T.L.R. 503.

[15] [1939] P. 11.

[16] [1952] P. 307.

[17] [1900] P. 180, 207.

It was suggested in argument that there is a distinction between desertion and the deprivation of sexual intercourse while the parties are living together, inasmuch as the natural instincts of the deprived spouse are more habitually invoked by the presence of the other. While this may be true in certain cases, it is difficult to distinguish between the deprivation caused by the resolute withdrawal for years to a separate room, and that caused by desertion.

There appears to be singularly little authority on the question whether even actual adultery of the petitioner can per se be conduct conducing to the adultery of the other spouse. It is not easy to understand why it should not be so in certain cases; for example, a confession that adultery has been committed, made without any antecedent warning, or even suspicion, that things were not as they should be, might be such a shock as to lead the other spouse to commit adultery under the reaction to the shock, and it may be that the same would apply whether the confession were true or false if it was intended to convince, and did convince, the other spouse of its truth. See *Glenister* v. *Glenister* [19] and *Allen* v. *Allen*.[20]

In this case, however, the husband does not assert that he believed that the wife had committed adultery; on the contrary, as has already been said, in spite of his suspicions, he said that he attributed her changed attitude to her own fear of conception.

Even assuming that belief in her actual adultery induced by the wife might be conduct conducing, there is a very long step between that and the suggestion that a bare suspicion of an improper association, although the suspicion subsequently proved to be justified, can be conduct conducing.

---

[18] [1947] A.C. 628; 63 T.L.R. 209; [1947] 1 All E.R. 563.

[19] [1945] P. 30; [1945] 1 All E.R. 513.

[20] [1951] W.N. 322; [1951] 1 All E.R. 724.

1956

BROWN v. BROWN.

The lack of authority on this point may be due to the fact that conduct conducing to the adultery charged against the respondent and the adultery committed by the petitioner have since 1857 both been discretionary bars only. Moreover, the older cases show that the test for the exercise of discretion in favour of a petitioner who had committed adultery was more severe than that for conduct conducing (see *Evans* v. *Evans and Elford* [21]). Indeed, Sir Gorell Barnes P. in that case seems to have gone to the length of ruling that even the fact that the respondent had been guilty of conduct conducing to the petitioner's adultery "afforded no ground for the exercise of "the discretion."

The earlier cases are reviewed by Sir Francis Jeune P. in *Symons* v. *Symons* [22] in which he, after very careful consideration, came to the conclusion [23] that it was safe and proper to hold that the circumstances which might be considered in exercising the discretion should include the case of a husband whose adultery and cruelty, before his desertion, and his prolonged desertion, were the main causes of the wife's adultery, so that he was guilty of misconduct conducing to her adultery.

In 1893, in *Cox* v. *Cox*,[24] a case to which we will refer later, Sir Francis Jeune P., addressing his mind to the question whether any marital misconduct of the husband, short of adultery, could conduce to the adultery of the wife, plainly takes it for granted that adultery itself may be conduct conducing.

In the later case of *Constantinidi* v. *Constantinidi and Lance*,[25] in which both the petitioner and the respondent had committed adultery, but it was found that the adultery of the petitioner had not conduced to the adultery of the respondent, Sir Francis Jeune P. exercised his discretion in favour of the petitioner. He called attention [26] to the fact that section 31 of the Matrimonial Causes Act, 1857, conferred a discretion on the Divorce Court, without imposing specifically any limitation or any directions with regard to its exercise, and, after reviewing the authorities again, laid it down that, although the discretion conferred by the section is a judicial and not an arbitrary discretion, "the causes for which the court may, in the exercise of its "discretion, allow a divorce notwithstanding misconduct by a "petitioner, are to be taken in combination and according to

---

[21] [1906] P. 125, 128; 22 T.L.R. 322.

[22] [1897] P. 167.

[23] Ibid. 175.

[24] (1893) 70 L.T. 200.

[25] [1903] P. 246; 19 T.L.R. 699.

[26] [1903] P. 246, 258–259.

"their several degrees of force, and also that the list of such "causes is not a closed book, but may be extended as occasion "arises."

However, *Wyke* v. *Wyke*[27] is another case in which the exercise of discretion was refused, although the case was recognized as being a hard one, and one in which the husband's conduct had to some extent conduced to the wife's adultery.

The Court of Appeal in *Constantinidi* v. *Constantinidi and Lance*,[28] in an appeal arising out of a variation of settlements in the original suit, indicated doubts as to whether Sir Francis Jeune P. had gone too far in his pronouncements, both in the earlier case of *Symons* v. *Symons*[29] and in the *Constantinidi* suit[30] itself.

It was in this state of the authorities, fully reviewed in his judgment in *Evans* v. *Evans and Elford*,[31] that Sir Gorell Barnes P. refused to exercise his discretion in favour of the petitioner.

Obviously it is not easy to reconcile all these earlier cases.

No doubt things have changed, and the discretion of the court in favour of a petitioner who has committed adultery is much more widely exercised than was formerly the case, inasmuch as considerations such as the interest of the children of the adulterous association, the interest of enabling the paramour to regularize his or her situation, have been introduced as relevant considerations, as well as the interest of the community at large in maintaining a true balance between upholding the sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. This has gone to the extent of holding that it may be proper in such cases to grant a decree to both spouses: *Blunt* v. *Blunt*.[32]

Thus, the position may be said to have been reversed, and the comparative rarity in recent times of the pleading of the adultery of the other spouse as conduct conducing may readily be explained by the simplicity of the procedure which enables the petitioner (or the respondent who is making cross-charges) to put himself or herself right with the court by making a disclosure of his or her own adultery.

It does not follow, however, from the widening of the grounds for the exercise of discretion in spite of the petitioner's own adultery that the test for conduct conducing is any less strict than before.

---

[27] [1904] P. 149.

[28] [1905] P. 253; 21 T.L.R. 651.

[29] [1897] P. 167.

[30] [1903] P. 246.

[31] [1906] P. 128.

[32] [1943] A.C. 517, 525, 531; 59 T.L.R. 315; [1943] 2 All E.R. 76.

Cox v. *Cox*,[33] in which the Court of Appeal upheld Sir Francis Jeune P. in holding that conduct short of adultery could conduce to adultery, is the case most favourable to the husband's contention of all that have been cited, and it is nonetheless authoritative on the law because the appeal was decided on an application to strike certain paragraphs alleging conduct conducing out of the plea. See, for example, *Jamieson* v. *Jamieson*[34] and many of the old cases in the common law Reports, in which the common law of England was developed upon demurrers to the sufficiency of a declaration or a plea.

What was pleaded in *Cox* v. *Cox*[35] was that for about five or six years the husband had paid marked attention to an unmarried lady of the parties' acquaintance, and when the wife had remonstrated with him, he told her that he would not, and could not, give up his intimacy with her, but had invited her to the house, and corresponded with her, notwithstanding the wife's repeated objections and remonstrances, and had made her presents, and had absented himself from his wife's society in order to enjoy the society of the lady. Moreover, he told his wife that he had been fascinated by her, and that he would have run away with her if she had consented. Further, that for the last three years the husband had paid marked attention to another lady, and had refused to give up his intimacy with her, notwithstanding the wife's objections and remonstrances, and that he had been guilty of acts of undue familiarity with the said lady, which were particularized as putting his arm round the lady's waist on two occasions, and her sitting on his knee on another.

Lindley L.J. pointed out that,[36] unlike ordinary pleadings both at common law and at equity, pleading facts which did not admit questions of degree or discretion, they had to consider a case in which degree was everything and in which the discretion turns upon the degree. He pointed out that, in proof of the concise statements of the pleading, evidence might be given, clothing the skeleton with flesh and blood, and so produce a picture which might justify a judge in declining to grant relief; and he approved the view of Sir Francis Jeune P. who said in effect: "Let me see the picture complete; then I will exercise "my discretion."

---

[33] 70 L.T. 200.

[34] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

[35] 70 L.T. 200.

[36] Ibid. 201.

Smith L.J. relied [37] particularly on the first and longer association, and asked himself whether, if all the alleged facts were proved, and if the skeleton, as Lindley L.J. called it, were filled up with flesh and blood, it was absolutely impossible that those facts could have conduced to the adultery. He added: "I do "not say whether they might or not, but it seems to me it is a "case which the respondent is entitled to make against the "petitioner."

It is plain, therefore, that the Court of Appeal held that, if justified by the evidence, the facts alleged were capable, in law, of amounting to conduct conducing, and that it was a question of degree and the discretion turning upon the degree, for the trial judge to say whether the husband's misconduct did or did not conduce to the wife's adultery.

In relying upon that case Mr. Moylan laid particular stress upon the change of onus effected by section 11 (3) of the Act of 1937, which, as has already been pointed out, obliges the complainant to satisfy the court of the negative. Thus he argued that the considerations which actuated the Court of Appeal in *Cox* v. *Cox* [38] apply a fortiori to a case in which the evidence has already been heard, and the issue determined in the husband's favour. In other words, he suggested, Smith L.J. would have asked himself whether it was impossible on the facts found by them for the justices to hold that they were not satisfied that the wife had not conduced to the husband's adultery.

Since it is to the question of causation that the change of onus is particularly directed, we acknowledge the force of this argument.

In *Cox* v. *Cox*,[38] however, there was a course, extending over years, of undue familiarity, persisted in by the husband, and even flaunted by him in the face of the wife, despite her repeated remonstrances. Moreover, the wife was plainly aware of the two associations pleaded.

In this case, although the association itself was improper, the most that can be said about its impact on the husband is that he may have sensed that there was something wrong. Even this is not very clearly established by his own evidence, since in one part of his evidence he attributed the wife's loss of affection and interest to her fear of conception.

---

[37] 70 L.T. 200, 202.

[38] 70 L.T. 200.

1956

BROWN
v.
BROWN.

But, even assuming that it is implicit in the findings of the justices that he suspected more than he knew, and that he was affected by what he suspected, it seems to us that the conduct alleged is so different in degree from that pleaded in *Cox* v. *Cox*,[39] and the impact on the husband from anything known or even suspected at the time when he committed adultery so much less than was the case in *Cox* v. *Cox*,[39] that we should be going much further than is warranted by that case, or any other decision, if we were to hold that the facts in this case are capable of amounting to conduct conducing.

No doubt the wife's evident loss of affection and interest may have rendered the husband more susceptible to temptation, but in our opinion, even invoking the change of onus, the misconduct here found against the wife cannot in law be held to be conduct conducing to the husband's adultery.

For these reasons we think the appeal succeeds.

Appeal allowed.
Leave to appeal.

Solicitors: *Gardiner & Co. for Humphrey Lynde & Vine, Great Yarmouth; Field, Roscoe & Co. for Richards & Flewitt, Nottingham.*

E. J.

---

[39] 70 L.T. 200.

1956
May 3.

Lord Merriman P. and Davies J.

JENKINS *v.* JENKINS.

Husband and Wife—Divorce—Conduct conducing—Wife's misconduct amounting to constructive desertion and no more—Husband's subsequent adultery not conduced to by wife's misconduct—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 11.

A wife complained to the justices on the ground of her husband's adultery. The husband admitted that he had been living in adultery since March, 1953, with a woman whom he had first met in August, 1952, but alleged that the wife, by her wilful neglect and misconduct, had conduced to his adultery. The justices found that, on January 1, 1952, the wife had forced the husband out of the matrimonial home and had thereby deserted him, but that, at that time, she had no real grounds for thinking that the husband would commit adultery. They, therefore, rejected the defence of

1956

JENKINS
v.
JENKINS.

misconduct conducing and made an order in favour of the wife. On the husband's appeal:—

Held, (1) that, although neither simple desertion nor constructive desertion and nothing more could amount to misconduct conducing, there might be circumstances connected with either which were such as to cause the deserted spouse to commit adultery, thus rendering the conduct of the deserting spouse, taken as a whole, capable of amounting to misconduct conducing.

(2) That since the present case was, upon the facts, one of constructive desertion and nothing more, the order had been properly made and the appeal should be dismissed.

Richards v. *Richards* [1952] P. 307; [1952] 1 T.L.R. 1321; [1952] 1 All E.R. 1384 and *Brown* v. *Brown*, ante 438; [1956] 2 All E.R. 1 explained.

Per curiam. The longer the time that has expired since the original act of desertion, the less likely the court would be to come to the conclusion that acts constituting desertion had conduced to subsequent adultery.

APPEAL by a husband from an order of justices of the Romford petty sessional division of February 20, 1956, made on the ground of his adultery.

The parties were married in April, 1932. There were three children, all of whom were of age. It appeared from the evidence that the marriage had from time to time been a somewhat stormy one. On several occasions proceedings had been instituted by the wife in a court of summary jurisdiction. On three occasions she withdrew her summonses; but, according to her own evidence given before the justices at the hearing which was the subject of the appeal, in or about April, 1942, before the Rochester justices, her complaint of persistent cruelty was dismissed; and on February 11, 1952, before the Romford justices she charged her husband with wilful neglect to maintain, persistent cruelty and desertion, and those complaints were dismissed. According to the husband's evidence before the justices in the present proceedings, the wife locked him out of the house in or about Christmas, 1951, and he had to get the police to help him to break in. Finally, on January 1, 1952, she forced the husband to leave the house and brought the proceedings of February 11, 1952, which were dismissed.

On February 20, 1956, the wife complained to the Romford justices that the husband had committed adultery with one Mrs. Stocker on January 3, 1956. At the hearing of the wife's complaint on March 5, 1956, the husband admitted that he had been living in adultery with Mrs. Stocker since March, 1953, but based his defence upon section 11 (3)[1] of the Matrimonial Causes Act, 1937, on the ground that the wife by her wilful neglect or misconduct had conduced to the adultery.

After a retirement of over two hours, the justices rejected the defence of misconduct conducing and made a separation and maintenance order in favour of the wife, at the same time delivering their reasons in writing.

As to the events of January 1, 1952, the justices found that "the wife did force her husband out; she told him to go, packed his clothes and was in a state of desertion on January 1, 1952." With regard to the history of the parties subsequent to the dismissal of the wife's complaint of February 11, 1952, and prior to the hearing of March 5, 1956, they said: "The husband some-"time about August, 1952, met Mrs. Stocker. He had not met "her until that time. About March, 1953, the husband com-"mitted adultery with Mrs. Stocker, and that adulterous "intercourse has persisted ever since and still continues. The "bench find that the allegation in the complaint, viz., that the "husband on January 3, 1956, committed adultery with Mrs. "Stocker is proved." The adultery was not disputed. The evidence on which the justices made their finding was that of an inquiry agent who gave evidence before them and produced two statements that he had taken from the husband and Mrs. Stocker respectively on January 3, 1956. It was plain that those statements were obtained by the inquiry agent, and given by the two people concerned, with a view to divorce proceedings being instituted by the wife on the ground of adultery.

The third and last finding of the justices was as follows: "The husband contends that the wife by her misconduct con-"duced to the husband's adultery. The husband's acquaintance "with Mrs. Stocker did not commence until some time after "the wife's desertion, and adultery did not commence until "about 14 months after the commencement of the desertion "[namely, in March, 1953]. The bench have found desertion

---

[1] Matrimonial Causes Act, 1937, s. 11: "(1) Among the grounds on "which a married woman may apply "to a court of summary jurisdiction "under the Summary Jurisdiction "(Married Women) Act, 1895, for an "order or orders under that Act there "shall be included the ground that "her husband has been guilty of "adultery. . . . (3) On any applica-"tion made by virtue of this section, "the court shall not make an order "unless it is satisfied that the appli-"cant has not condoned or connived "at, or by his or her wilful neglect "or misconduct conduced to, the "adultery, and that the application "is not made or prosecuted in col-"lusion with the other party to the "marriage or any person with whom "it is alleged that adultery has been "committed."

1956

JENKINS
v.
JENKINS.

"proved against the wife but nothing more, and applying the "test set out in *Richards* v. *Richards*,[2] the bench find that the "husband's adultery was not conduced to by the wife's conduct." Then they proceeded to deal with a more specific point: "One "point, in the opinion of the justices, needs to be dealt with. "The wife, at the end of her cross-examination, said (in effect) "that if she had turned her husband out 'He would go straight "'to another woman—that's the sort of man he is.' The bench "do not consider that that remark, uttered by a woman who "was by no means unwilling to hurt her husband in the witness-"box, should be taken at its face value. There is no evidence "that the wife had on January 1, 1952, any ground to suspect "her husband of adulterous conduct or that he would commit "adultery if she left him. She was jealous and had been "unjustifiably jealous of [another woman] but she never in any "way encouraged his association with Mrs. Stocker or any other "woman or had any real ground for thinking that her husband "would commit adultery with Mrs. Stocker or anyone else. "The bench find that the wife has proved her case."

From this finding the husband appealed.

D. Vowden for the husband. The wife was in desertion from January, 1952, and not until August, 1952, did the husband meet the woman with whom, it was admitted, he committed adultery for the first time in March, 1953. The adultery was directly caused by the wife's treatment of the husband and her failure to resume cohabitation, and that misconduct satisfied the test in *Herod* v. *Herod*[3] and conduced to the adultery found by the justices. The justices were wrong in applying the test in *Richards* v. *Richards*[4] to the facts of the present case, in which the misconduct of the wife amounted to constructive desertion and not simple desertion as was the fact in that case. The decision appropriate to the facts of the present case is that of *Brown* v. *Brown*,[5] which is authority for the proposition that constructive desertion on the part of one spouse can amount to misconduct conducing to the adultery of the other. The misconduct of the wife in turning the husband out of doors, accompanied by a long course of insulting and hurtful conduct, was the sort of contumelious conduct required to amount to constructive desertion.

---

[2] [1952] P. 307; [1952] 1 T.L.R. 1321; [1952] 1 All E.R. 1384.

[3] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.

[4] [1952] P. 307; [1952] 1 T.L.R. 1321; [1952] 1 All E.R. 1384.

[5] Ante 438; [1956] 2 All E.R. 1.

It is submitted, moreover, that the longer the period which elapses between desertion and the adultery of the deserted spouse the stronger is the presumption of misconduct conducing.

R. Bayne Powell for the wife. Whatever the nature of the wife's conduct, it could not have been a cause of the adultery with a woman whom the husband did not meet until eight months later. Further, the conduct of the wife amounted to constructive desertion and nothing more—the justices made no finding at all as to the alleged hurtful and insulting behaviour—and as such it was not sufficient to constitute misconduct conducing. There is no conflict between *Richards* v. *Richards* [6] and *Brown* v. *Brown*,[7] and the court in the latter case did not intend to say that every case of constructive desertion must also amount to misconduct conducing. The effect of those decisions taken in conjunction is that desertion, whether simple or constructive, and nothing more does not amount to misconduct conducing but that there may be facts which amount to misconduct conducing in connexion with either.

LORD MERRIMAN P. I am asking Davies J. to give the first judgment.

DAVIES J. stated the facts and continued: The point of the appeal can be shortly stated. The husband does not dispute the adultery; indeed, he has at all material times admitted that from and since March, 1953, he has been living in adultery with the woman named in the wife's complaint. The specific date which the wife charged was, of course, within six months of the complaint, namely, January 3, 1956. The husband's defence was based on section 11 (3) of the Matrimonial Causes Act, 1937. That subsection provides, so far as material, that "on any "application made by virtue of this section,"—that is, an application by a husband or a wife on the ground of adultery—"the court shall not make an order unless it is satisfied that the "applicant has not . . . by his or her wilful neglect or misconduct "conduced to the adultery."

As was emphasized by my Lord in a recent judgment of this court, to which I shall have to refer again, in *Brown* v. *Brown* [1]: "It is to be observed at the outset that in the Divorce Court "throughout the series of Matrimonial Causes Acts, now consolidated in the Act of 1950, misconduct conducing to adultery

---

[6] [1952] P. 307.

[7] Ante 438.

[1] Ante 438, 448; [1956] 2 All E.R. 1.

"has never been more than a discretionary bar to the relief of "divorce, and the effect of section 14 (1) of the Matrimonial "Causes Act, 1950, replacing section 5 of the Act of 1937, is that "it also affords a discretionary bar to the relief of judicial separa-"tion. In a justices' court, on the other hand, misconduct con-"ducing to adultery is made, by section 11 (3) of the Act of 1937, "an absolute bar to the making of an order which, if a non-"cohabitation clause is included, has the same effect as a decree "of judicial separation: Summary Jurisdiction (Married Women) "Act, 1895, section 5 (*a*). Moreover, the onus of satisfying the "court that his or her misconduct has not conduced to the "adultery charged is placed on the complainant, as in the case "of the absolute bars to relief upon a petition for divorce."

As my Lord has said in the course of the argument, there is a great deal of unreality about this case. We have listened to very interesting arguments as to whether this wife is entitled to keep her order for £2 a week made on the ground of the husband's adultery or whether she should be deprived of that order because her misconduct has conduced to the adultery. But it is plain beyond dispute that the wife, on the finding of the justices, has been in desertion of the husband from January 1, 1952, that is to say, for more than three years now; so that the husband can petition for divorce asking, no doubt, for the exercise of the discretion of the court in his favour, and subject always, of course, to the question whether it could be said that she continued in desertion after she had knowledge of and was plainly objecting to his adultery. And, conversely, the husband has plainly committed adultery and is living in adultery; so that the wife can petition for divorce; and although she would not in her petition have to ask for the exercise of the court's discretion, her desertion would be a discretionary bar, if the court were to come to the same conclusion as did the justices on the question of desertion. Thus the position of these parties could have been finally regularized, as in the present proceedings it cannot be.

If I may adopt what was said by my Lord, the last finding of the justices is, as I think, intended to be a gloss on the words "but "nothing more" in connexion with the desertion and deals with the question whether, when the wife turned her husband out, she was, as it were, driving him into the arms of another woman or had any real knowledge that that consequence was likely to follow her desertion of him. The justices say that that is what she said, but add in effect: "We do not accept that. He was not a man "who had been going about with other women. She did not "know that he was likely to go to another woman." And, of course, Mrs. Stocker was not on the scene. I think they are there dealing specifically with the point whether, in addition to the expulsion, there were circumstances that ought to have led the wife reasonably to believe, or, indeed, circumstances that would lead anyone reasonably to believe that the likely consequence would be that he would commit adultery. That the justices have expressly negatived.

A part of the attack on the justices' decision is based upon what they say in the concluding lines of the first paragraph of their reasons, which read: "The bench have found desertion "proved against the wife but nothing more, and applying the "test set out in *Richards* v. *Richards* [2] the bench find that the "husband's adultery was not conduced to by the wife's conduct." The criticism levelled against them is this. This was a case of constructive desertion; the wife turned the husband out. *Richards* v. *Richards*,[2] upon which they purport to base themselves, was a case of simple desertion, and in that case, in the Court of Appeal, Denning L.J., giving the leading judgment,[3] to which I will refer in a moment, did use words to the effect that desertion and nothing more cannot amount to misconduct conducing to adultery by the deserted spouse. But in a subsequent decision of this court, which could not have been present to the justices' minds, as the judgment was not given until March 16, 1956, namely, *Brown* v. *Brown*,[4] to which I have already referred, my Lord, giving the judgment of the court, expressly commented on that passage in the judgment of Denning L.J., in these words [5]: "We do not doubt that in using the phrase "'desertion and nothing more' Denning L.J. meant to exclude "cases of constructive desertion, for it is easy to imagine "expulsive words or other expulsive conduct which might very "well be held to conduce to adultery." Therefore it is said that the justices here misdirected themselves in basing themselves on *Richards* v. *Richards*,[6] which was a case of simple desertion, when the law with regard to cases of constructive desertion is correctly laid down in *Brown* v. *Brown*.[7]

The second criticism of that part of the justices' decision was that they have only found constructive desertion by expulsive words and expulsive conduct on January 1, 1952, but that, if one looks at the evidence as a whole (and it is plain that by and large they accepted the husband's evidence and rejected the wife's), there was abundant evidence of insulting, hurtful conduct by the wife over the period before the final parting between the parties.

---

[2] [1952] P. 307.
[3] Ibid. 310.
[4] Ante 438.
[5] Ante 452.
[6] [1952] P. 307.
[7] Ante 438.

The difficulty about this second point is that the justices have not made any specific finding about it at all. The conclusion to which they have come was that this was merely a case of constructive desertion, and they have not said anything else, or put any weight on antecedent matters, which, after all, all crystallized and were finalized in the act of driving the husband from the home. It is plain that it was present to the minds of the justices that insulting conduct might be a relevant matter in considering the question of misconduct conducing (hereinafter referred to as "conduct conducing"); for one of the authorities at which they were invited to look was *Hughes* v. *Hughes*,[8] to which I need not refer.

As the argument proceeded, it seemed to me that the expressions of opinion in the Court of Appeal by Denning L.J., and in this court by my Lord, in the two cases to which I have referred, really are completely harmonious and complementary. In my opinion, Denning L.J.'s judgment [9] does not and cannot mean that in no case of simple desertion can the circumstances of the desertion ever amount to conduct conducing. The relevant passages in that judgment, I think, are those in which he says [10]: "In this case, therefore, the first question is whether the "husband's conduct did conduce to the wife's adultery. Con- "duct only conduces to adultery when it is such conduct 'as "'is proved to have brought about the adultery': see *Herod* "v. *Herod*.[11]" The following words are, in my judgment, important: "There must be conduct which is closely and "directly connected with the adultery, such as exposing a wife "to known and obvious dangers. Applying this test, I am "clearly of opinion that desertion by itself is not conduct con- "ducing to adultery." That is the sentence which, as I think, has been somewhat torn out of its context and used in the textbooks. The judgment goes on [12]: "It would be deplorable if "desertion by one party were thought to be an excuse for the "other party to go and commit adultery. It may explain the "adultery, but it does not excuse it. During the war it often "happened that, when the husband was serving abroad, his

---

[8] (1866) L.R. 1 P. & M. 219.
[9] [1952] P. 307, 310.
[10] Ibid. 310.
[11] [1939] P. 11.
[12] [1952] P. 310.

"wife at home committed adultery; and in the pension cases it "was always held that the wife's adultery was not caused by "the separation at all, but was due to her own personality and "conduct. So it seems to me in these cases when there is "desertion and nothing more, and then the wife commits "adultery, her adultery is not due to the desertion, but is due to "her own weakness of character; or, as no doubt she would prefer "to put it, because she fell in love with another man. That is "the case here. A year after the desertion she fell in love with "another man, and she committed adultery with him. The "adultery is due to her own weakness of character and not to "the desertion." Then, omitting one paragraph [13]: "Mr. Kee "argued that in this case there was something more than "desertion, but it is significant that in the pleadings it was "never alleged that the husband's conduct had conduced to the "adultery. That does not prevent the court from considering "it; it may have to do so; but, nevertheless, if the wife does "not allege it, it does go to show that there is nothing in the "contention. This wife was not left destitute. After her "husband deserted her she was living at home with her parents, "and going out to work and earning her living in the same way "as she had done before the marriage. She said in evidence "that she did not take proceedings in the magistrates' court "against her husband for desertion because she did not want "money. She was earning enough as she was. In those "circumstances it seems to me to be plain that his conduct did "not conduce to her adultery."

That last passage seems to me to make it clear that Denning L.J. is there contemplating the possibility of cases of simple desertion where the conduct of the deserting party could well be said to conduce to adultery on the part of the deserted spouse. For example, he says, "this wife was not left destitute." And I should have thought it plain that it is implicit in those words that Denning L.J. was contemplating cases of a sort with which we are all familiar, where a wife is left destitute; the husband goes off—a case of simple desertion—and leaves the wife with probably one or more children to educate, bring up and feed, with no money, and she then forms a liaison with another man. Those are circumstances in which the court might, in my view, come to the conclusion that the conduct of the deserting party had conduced to the adultery on the part of the other spouse. Therefore I think it right to say that, in my opinion, *Richards* v. *Richards* [14] does not decide that no case of simple desertion can amount to conduct conducing.

---

[13] [1952] P. 307, 311.

[14] [1952] P. 307.

On the other hand, turning to *Brown* v. *Brown*,[15] one thought at one time, if I may say so with respect, that Mr. Vowden was rather asking us to say that, on the basis of my Lord's judgment in that case, all constructive desertion ought to be taken to amount to conduct conducing to the other spouse's adultery. In my opinion, that is not right. *Brown* v. *Brown*[16] was, of course, as was pointed out in the argument, almost the exact converse of the present case. In that case a wife brought proceedings before the justices, as did the wife in the present case, asking for an order on the ground of the husband's adultery. The wife had formed an improper association, though not an adulterous association, with a man, and in consequence the husband, although it is perfectly plain that he did not know about it, realized that her feelings were getting cold and that she was becoming indifferent to him; as a result of this, and contemporaneously with the affair which his wife was carrying on with the man, he formed an adulterous association with a woman. The justices in that case held that the wife's conduct conduced to the husband's adultery and refused an order upon that ground. On appeal to this court the court entirely agreed with the justices that the chain of causation was unbroken, that is to say, that the wife's conduct had caused the husband to commit adultery; but the decision of this court was that, in the circumstances, the conduct complained of as conduct conducing was not such as to be capable in law of being conduct conducing. In other words, what was in dispute there was not: did the wife's conduct cause the adultery? but: in law could it be interpreted as conduct conducing? But here, one might say, the question is not: can the wife's conduct be conduct conducing? but: did it, in fact, conduce to the adultery? I think I need only refer to two passages in my Lord's judgment in *Brown* v. *Brown*.[16] The first is where he says[17]: " We feel no difficulty in holding that " there was no break in the chain of causation between the " association and its impact on the husband's mind and feelings. " But this still leaves open the question whether his alleged " reaction to the affair was justified. In other words, whether " the association or its impact on the husband, taken at its " highest, is capable in law of amounting to conduct conducing to " his adultery." And then[18]: " But, even assuming that it is

---

[15] Ante 438.

[16] Ibid.

[17] Ibid. 451.

[18] Ibid. 458.

"implicit in the findings of the justices that he suspected more "than he knew, and that he was affected by what he suspected, "it seems to us that the conduct alleged is so different in degree "from that pleaded in *Cox* v. *Cox*,[19] and the impact on the "husband from anything known or even suspected at the time "when he committed adultery so much less than was the case in "*Cox* v. *Cox*,[19] that we should be going much further than is "warranted by that case, or any other decision, if we were to "hold that the facts in this case are capable of amounting to "conduct conducing.

"No doubt the wife's evident loss of affection and interest "may have rendered the husband more susceptible to temptation, but in our opinion, even invoking the change of onus, "the misconduct here found against the wife cannot in law be "held to be conduct conducing to the husband's adultery."

To return from that to the present case, it may be that the justices, whose decision was given before *Brown* v. *Brown*[20] was decided, were guilty of some degree of misdirection when they said "applying the test set out in *Richards* v. *Richards*[21] the bench "find that the husband's adultery was not conduced to by the "wife's conduct" on the ground that they found desertion proved against the wife and nothing more. But they have found that when the wife turned the husband out on January 1, 1952, he was not driven into another woman's arms at that time; they have found, contrary to what the wife said, that she had no idea that he was likely to go to another woman, that he did not meet the other woman until August, 1952, and that he did not commit adultery with her until March, 1953, so that the adultery did not commence until about 14 months after the commencement of the desertion. What, in my opinion, they have found in this case is constructive desertion by mere expulsion and nothing more. And when one has a case of constructive desertion and nothing more, such as this, that, in my opinion, does not amount to conduct conducing, any more than does simple desertion and nothing more. But if there are facts connected either with the circumstances of simple desertion or with the circumstances of constructive desertion which are such as to result in causing the deserted spouse to commit adultery, then that is or may be conduct conducing.

The justices here have found, I think rightly, on the whole of this evidence, that when this man went off he had been turned out, but that it is impossible to say that when, months later, he formed an acquaintance with a woman who until then was a stranger to him, and when much later still he started to commit adultery and has ever since lived in adultery with her, that adultery was conduced to by his wife's act in expelling him.

---

[19] (1893) 70 L.T. 200.

[20] Ante 438.

[21] [1952] P. 307.

I think there is one other point which was pressed upon us by Mr. Vowden with which I should deal. I think he was arguing that the longer desertion continues, the more likely the desertion is to drive the deserted spouse to commit adultery. I do not think it is necessary to pronounce upon that as a principle. Speaking for myself, I should have thought that the circumstances of a particular desertion might wear away, and that the longer the time that has expired since the original act of desertion, the less likely it would be that the court would come to the conclusion that the act of desertion had conduced to adultery starting years afterwards. But I do not think it is necessary to decide that point one way or the other.

I think that it is sufficient for the purposes of this case to say that in all the circumstances I can see no ground for saying that in the ultimate event the justices, who obviously considered this case very carefully, have come to any other than the correct conclusion.

In my opinion, this appeal fails and should be dismissed.

LORD MERRIMAN P. I agree so completely with the judgment which has been delivered that I only wish to add one sentence to show that my agreement includes the point relating to the supposed disharmony between *Richards* v. *Richards* [22] and *Brown* v. *Brown*.[23] In my opinion, just as it is clear that Denning L.J.'s judgment in *Richards* v. *Richards* [24] does not mean that in cases of simple desertion there can never be anything in the nature of conduct conducing, so the passage in the judgment of this court in *Brown* v. *Brown* [25] does not mean that all cases of constructive desertion must necessarily contain something in the nature of conduct conducing. I agree that this appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Pinney, Mummery & Co.; Daybell's.*

E. J.

---

[22] [1952] P. 307.

[23] Ante 438.

[24] [1952] P. 307.

[25] Ante 438.

1956
Apr. 19, 23,
24, 25;
May 14.

Lord
Merriman P.

TAYLOR (FORMERLY KRAUPL) *v.* NATIONAL ASSISTANCE BOARD AND ANOTHER.

Legal Aid—Disposable income—Subject-matter of dispute—Order for alimony pending suit after application but before computation—Sum payable under order not disposable income—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 4 (3)—*Legal Aid (Assessment of Resources) Regulations,* 1950 (*S.I.* 1950, *No.* 1358), *reg.* 2.

Tribunal — Statutory — Control by courts — Declaration — National Assistance Board—Disposable income for legal aid—Legal Aid (Assessment of Resources) Regulations, 1950, *reg.* 2.

A wife respondent in a divorce suit applied on June 14, 1955, for a civil aid certificate to defend divorce proceedings and to claim certain ancillary relief. On June 27, 1955, an interim order for alimony pending suit at the rate of £450 per annum less tax payable monthly was made in her favour and that sum represented her sole income at the material time.

On July 18, 1955, the wife was offered a civil aid certificate on certain terms as to the contribution which she was required to make and a fresh offer on more favourable terms was made on August 19, 1955. The National Assistance Board, in assessing her disposable income, had based their assessment upon the order for alimony pending suit as income to be received by her during the period of computation, namely, the 12 months ensuing from the date of application. By regulation 9 (2) of the Legal Aid (Assessment of Resources) Regulations, 1950, every determination or decision by the board shall be final.

The wife applied by originating summons under R.S.C., Ord. 54A, r. 1A, for the determination of the question whether, on the proper construction of section 4 of the Legal Aid and Advice Act, 1949, and the regulations made thereunder, the sum payable to her by virtue of the order for alimony pending suit was to be taken into account in assessing her disposable income for the purpose of the civil aid certificate enabling her to proceed in the divorce suit, and for a declaration that it was not so to be taken into account:—

Held, (1) that a challenge to the finality of the computation of disposable income on the ground that it was contrary to the statute and the regulations made thereunder was not necessarily to be made by certiorari and that the court had jurisdiction to intervene by way of declaration.

In re Carnarvon Harbour Acts, 1793–1903, Thomas v. *Attorney-General* [1937] Ch. 72; [1936] 2 All E.R. 1325 distinguished.

Barnard v. *National Dock Labour Board* [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113 and *Bagettes Ltd.* v. *G. P. Estates* [1956] Ch. 290; [1956] 1 All E.R. 729 applied.

(2) That in computing the rate of income the question whether a particular resource was or was not a "subject-matter of the dispute" depended on determining the point of time to which those words

related; upon the true construction of the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2, the date of the application was also the date for determining what was the subject-matter of the dispute.

(3) That it was contrary to the general principles of the legal aid scheme that the fact that the dispute had ended in the recovery of the very thing which, at the time of the application for the civil aid certificate, was "the subject-matter of the dispute" should render the value recovered subject to the double liability of being treated retroactively as disposable income or capital and also of being charged for any short-fall between the contributions and the net liability of the legal aid fund under section 3 (4) of the Act; the latter was the appropriate means of ensuring that such an increase in resources attracted an additional contribution to the legal aid fund, and the special exemption of the particular property under consideration from chargeability under the Legal Aid (General) Regulations, 1950, reg. 16, was irrelevant.

(4) That a declaration should be made that the wife was entitled not to have the amount of the alimony pending suit included in the computation of her disposable income for the purposes of her contribution to a civil aid certificate.

ORIGINATING SUMMONS under R.S.C., Ord. 54A, r. 1A.

The plaintiff was the respondent to a petition for divorce presented by her husband on March 11, 1955. On May 16, 1955, an emergency certificate under regulation 10 of the Legal Aid (General) Regulations, 1950, was issued to the wife to defend the husband's petition, and to present a cross-petition.

On June 14, 1955, the wife applied for a civil aid certificate on the prescribed form according to the provisions of regulation 3 of the Legal Aid (General) Regulations, 1950. She thus gave the requisite information to enable the local committee to determine the nature of the proceedings in relation to which legal aid was sought, namely, a matrimonial cause in which the wife's application for alimony pending suit had already become a subject-matter of the dispute and to determine her disposable income.

On June 24, 1955, the emergency certificate was extended for a further period of six weeks, and on June 27, 1955, an interim order for alimony pending suit at the rate of £450 per annum less tax payable monthly was made in the wife's favour. The previous allowance of £4 a week ceased on July 1, 1955, and it was common ground that the amount of the order represented the sole income of the wife at the material time.

On July 18, 1955, the wife received an offer of a civil aid certificate on the basis that her disposable income had been assessed at £410 per annum and her maximum contribution at

1956

TAYLOR (FORMERLY KRAUPL) *v.* NATIONAL ASSISTANCE BOARD.

£127, payable by an initial contribution of £10 11s. 8d. and 11 monthly instalments of the same amount.

From correspondence which passed between the wife's solicitors and the National Assistance Board it was manifest that the computation of the wife's disposable income had been made solely upon the basis of the amount to be received by her as alimony pending suit under the order of the court within the 12 months next ensuing from the date of her application for a civil aid certificate.

On August 19, 1955, a fresh offer of a civil aid certificate was made on the basis of a maximum contribution of £107, the original assessment having been based upon the incorrect assumption that the wife would receive a full year's allowance under the order for alimony pending suit during the period of computation.

On February 16, 1956, the wife issued an originating summons under R.S.C., Ord. 54A, r. 1A, against the National Assistance Board, as defendants, for the determination of the question whether, upon the proper construction of the Legal Aid and Advice Act, 1949, s. 4,[1] and the regulations made thereunder, namely, the Legal Aid (Assessment of Resources) Regulations, 1950, as amended,[2] the sum of £450 per annum less tax payable monthly to the wife pursuant to an interim order for alimony pending suit made on June 27, 1955, was to be taken into account in assessing her disposable income under the Act, and for a declaration that in her application for a civil aid certificate to enable her to defend and cross-petition in a suit for divorce, any sum payable to her under an order for alimony pending suit in such suit was not to be taken into account in assessing her disposable income for the purposes of the Legal Aid and Advice Act, 1949. A further application for a declaration that the determination of the National Assistance Board determining the disposable income of the wife as £370 was ultra vires was abandoned.

The Law Society, as the body charged with the administration of the Legal Aid and Advice Act, 1949, was served with notice of the application and was separately represented at the hearing, at which it was conceded by the National Assistance Board and the Law Society that the application for a civil aid certificate dated June 14, 1955, was for the purposes of the case to be deemed to be continuously effective up to the date of the hearing.

---

[1] Legal Aid and Advice Act, 1949, s. 4 (3): "The regulations shall "include provision for securing that "the resources of a person seeking or "receiving legal aid shall be treated "as not including the subject matter "of the dispute."

[2] Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2: "In computing the rate of income or "the amount of capital of the person "concerned there shall be excluded "the value of the subject matter of "the dispute in respect of which "application has been made for a "certificate."

The facts are set out in full in the judgment of Lord Merriman P.

Rodger Winn, for the National Assistance Board, taking a preliminary point as to the jurisdiction of the court. Where it is sought to assert that a statutory body has acted in excess of its powers, the correct proceedings are by way of prerogative writ. By the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 9 (2), every determination or decision by the board shall be final. [*Moss* v. *Moss*[3] was referred to.] To support an originating summons under R.S.C., Ord. 54A, r. 1A, there must be a right arising from the construction of the statute. The question of construction arising in the present application is whether the wife can obtain legal aid without the payment of contributions. A right might arise if the board were under a duty to make a payment to the wife, but this is not the case. It might be said that all the wife is seeking to enforce in the present application is her right to an immunity. Since she has no right as against the board, the board cannot be made a party to this summons and can only be proceeded against by way of prerogative writ. It is true that the prerogative writ will not run if another remedy is available. In *In re Carnarvon Harbour Acts, 1793–1903, Thomas* v. *Attorney-General*[4] a summons was taken out under R.S.C., Ord. 54A, r. 1A; it was held that, there being no practical question to determine, the court would not exercise its powers under the Order in an academic capacity. Similarly, in the present case, although the National Assistance Board would welcome an interpretation of the statute, it must be considered whether any right within the meaning of the Order is being claimed and whether the present procedure is the correct one.

J. B. Latey for the Law Society. The Law Society trust that this court will determine the question of the merits of this application.

J. E. S. Simon Q.C. and *Roger Ormrod*, for the plaintiff wife, on the preliminary point. Counsel for the board concedes that it would be possible to challenge the determination of the National Assistance Board in the present case by way of prerogative writ

---

[3] [1956] 2 W.L.R. 469; [1956] 1 All E.R. 291.

[4] [1937] Ch. 72; [1936] 2 All E.R. 1325.

1956

TAYLOR (FORMERLY KRAUPL) v. NATIONAL ASSISTANCE BOARD.

and that, therefore, the word "final" in the regulation must be subject to a qualification, i.e., "provided that the National "Assistance Board acts according to law." Any error of law is challengeable by prerogative writ or in any of the ways open to an applicant under the Rules of the Supreme Court. Certiorari would be an appropriate writ in the present case; but it is not an exclusive remedy, and declarations under R.S.C., Ord. 25, r. 5, and Ord. 54A, r. 1A, are also available. [Reference was made to the Common Law Procedure Acts, 1852–1860.] This Division was chosen as the proper one in which to bring the present proceedings because the matter largely concerns alimony pending suit. It is, therefore, no argument against the jurisdiction of this court to say that the wife could also have proceeded by way of certiorari. She has been aggrieved by a determination of the National Assistance Board restricting her rights. If her disposable income has been wrongly assessed, that is to say, by some method that contravenes section 4 of the Legal Aid and Advice Act, 1949, in such a way as to operate to her disadvantage, then she has a right to be correctly assessed, and the body statutorily charged with the function of assessing owes her a duty so to assess it. This is particularly the case, since by regulation 4 of the Legal Aid (General) Regulations, 1950, as amended in 1954, once the board has made a determination of the maximum amount of the contribution and the cost of the proceedings are likely to exceed that amount, the Law Society is bound to require payment of the maximum contribution. An incorrect assessment is a wrong against a person in respect of whose income it is made; and such a person has a right to a civil aid certificate free from conditions imposed as a result of a wrong construction of the statute. As to *In re Carnarvon Harbour Acts, 1793–1903, Thomas* v. *Attorney-General*,[5] it is in each case a question of discretion whether the court ought to make a declaratory order: all that the decision in that case amounted to was that the court had jurisdiction, but was, in its discretion, not prepared to exercise it for reasons which have no relevance to the present case. [*Bagettes Ltd.* v. *G. P. Estates*[6] was referred to.]

[LORD MERRIMAN P. I have come to the conclusion that the preliminary objection must be overruled for reasons to which I will refer in my judgment.]

J. E. S. Simon Q.C. and *Roger Ormrod*, on the merits, referred to the provisions of the statute and regulations governing the contributions to be made to the legal aid fund by an assisted person and particularly to sections 2 (1) (2), 3 (4) and 4 (3) of the Legal Aid and Advice Act, 1949, and to regulation 2 of the Legal Aid (General) Regulations, 1950. In section 3 (4) of the Act[7] is to be found the important phrase "property which is recovered "or preserved" which is taken over from section 69 of the Solicitors Act, 1932. The general scheme is to place the legal aid fund in the position of a solicitor who may obtain a charging order on property recovered in the litigation in respect of his costs therein. Another important provision for present purposes is regulation 16 (8) of the Legal Aid (General) Regulations, 1950, as amended, which states that, except in so far as the regulations otherwise provide, alimony and maintenance are not to be charged under section 3 (4) of the statute for the benefit of the legal aid fund. This provision applies, inter alia, to the matters dealt with in section 19 of the Matrimonial Causes Act, 1950, and forms an exception to the general rule as to the liability to be charged. It would be odd in the extreme if it were to be held that Parliament intended alimony pending suit to be made liable whilst the larger amount of alimony or maintenance were not so liable. It is not submitted that the consideration referred to is conclusive, but that it is an indication that Parliament did not intend a wife to be liable to pay contributions to the legal aid fund out of amounts received as alimony pending suit. Parliament excepted from the liability to be charged the type of property referred to in regulation 16 (8) because it is property to be used for the support of the wife, and for no other purpose; and to this extent regulation 16 (8) is of use in construing section 4 (3) of the Act.

---

[5] [1937] Ch. 72.

[6] [1956] Ch. 290; [1956] 1 All E.R. 729.

If "the subject-matter of the dispute" must include "property recovered or preserved," then it must include maintenance, and it would have been unnecessary to make any exception. It is not submitted that property which is "the subject-matter of "the dispute" according to section 4 (3) and "property which is "recovered or preserved" under section 3 (4) are coincident, but that the former may become the latter. It would be quite wrong to assess a person as having property which he might be divested of as a result of the action.

---

[7] Legal Aid and Advice Act, 1949, s. 3 (4): "Except so far as regulations otherwise provide, any sums "remaining unpaid on account of a "person's contribution to the legal "aid fund in respect of any proceedings and, if the total contribution is "less than the net liability of that "fund on his account, a sum equal "to the deficiency shall be a first "charge for the benefit of the legal "aid fund on any property . . . re-"covered or preserved for him in the "proceedings."

[LORD MERRIMAN P. That would be a reason for excluding from computation property which is the subject of a dispute. That is the crux of this case. Maintenance comprehensively is the property of the wife and would be taken into account as property recovered were it not for the specific exemption contained in regulation 16 (8). The policy of exclusion is that it may never be recovered or preserved.]

Analogous situations can be taken from the field of the common law. For example, an action is commenced for the return of a chattel and damages for its detention. The plaintiff applies for legal aid; but before the assessment of his contribution the chattel is returned, although damage is denied. In this situation it is submitted that the National Assistance Board is not entitled to say that the chattel is an asset. It was part of the subject-matter of the dispute and the same consideration applies to the damages if they should be assessed and agreed.

The above are the submissions on the Legal Aid (General) Regulations, 1950, as amended, and the Legal Aid (Assessment of Resources) Regulations, 1950. By the definition clause of the latter regulations the period of computation is 12 months. It is, therefore, clear that an annual sum is envisaged, whereas alimony pending suit may last for less than a year. That is prayed in aid as showing that it could not have been intended that alimony should be regarded as a resource.

[LORD MERRIMAN P. You have assumed that alimony pending suit is a subject-matter of the litigation. I have had cases in which the amount of an order of a court of summary jurisdiction, from which there is an appeal, has been included in the computation of the wife's resources for the purpose of a civil aid certificate to resist the appeal.]

It is submitted that the considerations which apply to such a case apply also to the present case and what was said in *Thorogood* v. *Thorogood* [8] is prayed in aid.

As to the question of the finality of the board's computation, it is submitted that the concession made by counsel for the board that certiorari lies imports that " final " means only if according to law.

[*Rodger Winn*. It is accepted that finality means subject to the determination being lawful, and lawful, in these circumstances, means according to the statute and the regulations: see

---

[8] The Times, Oct. 20, 1955.

Reg. v. *Vestry of St. Pancras* [9] and *Barnard* v. *National Dock Board.*[10]]

The only authority which is relevant to the question of the construction of the subsection is *Thorogood* v. *Thorogood* [11] (the transcript of the hearing was read). Unless there is a distinction between maintenance and alimony pending suit the decision in that case is binding in the present case. Accepting that case as binding and correct, one is driven to ask rhetorically: where is the line to be drawn? If an order is made under section 23 of the Matrimonial Causes Act, 1950, and there is an appeal to the Court of Appeal, the situation there as to the computation of income for the purpose of a civil aid certificate must be the same as in *Thorogood* v. *Thorogood* [11] and the same considerations would apply to such a cause when it was at first instance. Supposing the judge, upon a summons for directions, were to order interim periodical payments, the amounts ordered to be paid from time to time would be equally the subject-matter of the dispute.

[LORD MERRIMAN P. In *Thorogood* v. *Thorogood* [11] there was an existing order and the order was the whole subject-matter of the dispute.]

Maintenance and alimony are both separate subject-matters of the present dispute, and it is impossible to say that a maintenance order made by justices is a subject-matter of the dispute whilst maintenance granted by a registrar is not. The same considerations must apply to a maintenance order made by a registrar and an appeal to the Divisional Court from an order made by the justices. Similarly, why should there be any distinction between an appeal to a judge in chambers from an order made by a registrar, first, in a restitution suit and, secondly, in a divorce suit? Ex concessis, the maintenance is the subject-matter of the dispute when it is the subject-matter of the appeal.

Section 4 (3) of the Act is the present subject-matter of this argument and it makes no mention of a certificate. It is not open to counsel for the board to cut down the scope of the subsection by linking it to regulation 2, which does refer to the certificate. Alimony pending suit has always been considered as a personal allowance to enable a wife to subsist during the pendency of the suit. It is not intended for any other purpose, nor will the court allow it to be so used. It is not alienable or assignable. It is a substitution of the common law right of a wife to pledge the husband's credit for necessaries. In the latter case the wife is acting as the husband's agent; therefore alimony pending suit is to be considered as the income of the husband and not of the wife: see Shelford's Marriage and Divorce.[12] In *Cross* v. *Cross*[13] it was held that a solicitor could not exercise his lien so as to intercept a wife's alimony pending suit towards payment of his costs. If a wife, in circumstances such as the present, is bound to hand over a portion of her alimony pending suit to the Law Society, then the husband must be pro tanto liable for her necessaries. In *In re Robinson*[14] it was said that alimony was not assignable. That view of the function of alimony pending suit has continued until the present, as is shown by *J. Walls Ltd.* v. *Legge*.[15] It is submitted that the assessment in the present case involves an alienation, and that the construction sought to be placed on the subsection and the regulation runs contrary to the principles laid down as to alimony pending suit. [Reference was also made to *Hunt* v. *De Blaquière*.[16]]

---

[9] (1890) 24 Q.B.D. 371; 6 T.L.R. 175.

[10] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113.

[11] The Times, Oct. 20, 1955.

A husband is liable for necessaries required by the wife: *Hayward* v. *Hayward*[17]; and *Keegan* v. *Smith*[18] is further authority for the proposition that a husband is liable for necessaries supplied to his wife before the making of a decree (as it then was) for alimony. A wife in the position of the present wife could, at great inconvenience to herself, continue to subsist by making her husband liable for necessaries, and the board could not take such sums into account. In *Paquine* v. *Snary*[19] it was held that a receiver could not be appointed in respect of maintenance ordered under the Summary Jurisdiction (Married Women) Act, 1895, which was not assignable and was inalienable. If the whole of the income of the wife in the present case is inalienable, she has no disposable income for the purposes of the regulations.

It being a principle of the construction of statutes that Parliament will not lightly be presumed to be unjust or absurd in its enactments, one must consider what is the effect of the construction which the board now seeks to put upon the Act? The wife will be entitled to go back to the registrar and get an increased order for alimony in view of this new charge on her income. This will lead to a fresh assessment, and thus again to an application to the registrar. In many cases, as in this, such a process will end in the amount of the wife's alimony being beyond the limits of the legal aid scheme, so that her certificate must be revoked. The husband would then be entitled to go back to the registrar and seek a reduction of the order, as the charge on the wife's income would then be removed. The whole process would then restart.

---

[12] (1841), p. 589.

[13] (1880) 43 L.T. 533.

[14] (1884) 27 Ch.D. 160.

[15] [1923] 2 K.B. 240.

[16] (1829) 5 Bing. 550.

[17] (1858) 1 Sw. & Tr. 81, 85.

[18] (1826) 8 D. & R. 118.

[19] [1909] 1 K.B. 688; 25 T.L.R. 212.

Further, "property which is recovered or preserved" under section 3 (4) of the Act is not coincident with the "subject-matter "of the dispute," but the latter must include the former. Regulation 16 (8) of the Legal Aid (General) Regulations, 1950, as amended, takes maintenance and alimony out of the provisions of section 3 (4) of the Act, which would have been unnecessary unless maintenance and alimony were recognized as included in the subject-matter of the dispute. If alimony pending suit is included in "property which is recovered or preserved" and the latter is included in that which is the "subject-matter of the dispute," then alimony pending suit must be included in "the subject-"matter of the dispute." It is submitted that according to the proper construction of the statute "subject-matter" is property of ascertained value which, or any part of which, can be recovered in the dispute to which the certificate relates. "Dispute" means a right which has been set up by one party and denied by the other either as to the right itself or as to quantum.

Rodger Winn for the National Assistance Board, on the merits. It was submitted for the wife that section 4 (3) of the Legal Aid and Advice Act, 1949, is to be read as meaning that the resources of a person seeking or receiving legal aid shall be treated as never including alimony pending suit, and a similar construction was placed on regulation 2 of the Legal Aid (Assessment of Resources) Regulations, 1950. It was further said that moneys coming into the hands of a wife under an order of the court cannot be charged or assigned before she receives them. It does not follow that once she has received such sums she cannot dispose of them for any purpose she chooses. It is conceded that in such cases assignment is invalid and that judgment creditors cannot either by writ of fi. fa. or the appointment of a receiver get the right to intercept, before she receives it, sums of money due under an order for alimony or maintenance or many types of pensions. She may or may not agree to spend her alimony pending suit upon contributions exacted as a term of the granting of a civil aid certificate. Had she taken up the certificate offered to her she would have been bound to pay the contributions thereunder, but this would not have been an assignment.

[LORD MERRIMAN P. Was it not an offer to charge her alimony pending suit?]

No, by the express provision of regulation 16 (8) of the Legal Aid (General) Regulations, 1950, as amended, no charge may be imposed in such circumstances.

It is a mistaken view to say that, because alimony pending suit is inalienable and not assignable, the money payable thereunder is not to be taken into account as a "resource," which is the word used in section 4 (3) of the statute. "Disposable "income" is defined in the statute, and the statute and the regulations provide that certain forms of income shall not be regarded as disposable. [Reference was made to the Second Schedule of the Act and the First Schedule of the Legal Aid (Assessment of Resources) Regulations, 1950, para. 3 of Part I.] Paragraphs 6 and 7 of the latter Schedule are also in point, the former stating that an annuity shall be taken into account if it accrues during the period of computation and the latter referring to any voluntary allowance which the applicant may reasonably expect to receive. These provide the clearest possible guide to the construction of the words "disposable income." Alimony pending suit is not referred to at all although it is referred to elsewhere in the regulations to ensure that no charge shall fall thereon.

It is conceded that, on a proper construction of regulation 2, "subject-matter" must be read as "any subject-matter" and "dispute" as "any dispute." If, in any given case, at the moment of time when the computation of resources is made there is still outstanding a dispute one of the subject-matters of which is (a) a matter in respect of which legal aid was sought, (b) something of value, then that value must be excluded from computation. It is intended to exclude from the above proposition any subject-matter as to which, when the certificate was granted, there was no continuing dispute. If a legal aid certificate is granted in divorce proceedings the maintenance to be paid to the wife cannot fail to be a subject-matter of the dispute in respect of which it is granted, but if, when the computation of resources is made, there is no longer any need to apply for alimony pending suit, it is submitted that alimony pending suit is not then a "subject-matter of the dispute." [*National Assistance Board* v. *Parkes* [20] was referred to.] The right to alimony pending suit and the amount thereof was already settled in the present case before computation of resources was made. It makes no difference whether one regards alimony pending suit as part of the subject-matter of the whole dispute or as a separate subject-matter. Once the wife has received her order the income therefrom becomes part of her disposable income and that creates a change of circumstance. The assessment of contribution in the present case was no more of a charge upon the alimony pending suit than would be a normal assessment of earnings a charge upon them. The submission is, substantially, that any income which has become unconditionally available becomes a " resource " within the meaning of this statute. It is conceded that where the availability of the income is dependent upon the outcome of some future dispute it falls within the meaning of regulation 2, which should be read " . . . there shall be excluded the value of the " subject-matter of the dispute then existing . . ."; while counsel for the wife would read it " dispute at any time . . ."

---

[20] [1955] 2 Q.B. 506; [1955] 3 All E.R. 1.

In re Tennant's Application,[21] while not directly in point, does indicate, however, that alimony pending suit may not be entirely sacrosanct. In any event the power of the court to order the payment of alimony pending suit to a trustee in bankruptcy is the exercise of a judicial power and it is not suggested that alimony can be charged or assigned.

The payments referred to in the Second Schedule to the Act and the First Schedule to the Legal Aid (Assessment of Resources) Regulations, 1950, have, it is submitted, a certain common character which indicate that Parliament may have regarded the legal aid scheme as one of the public benefits analogous to and forming part of a general scheme of welfare represented by the National Insurance Acts. By section 32 of the National Insurance Act, 1946, a person cannot assign national insurance benefit, and section 28 of the National Insurance (Industrial Injuries) Act, 1946, is to the same effect. Nevertheless, according to the provisions of the legal aid scheme the excess of such benefits over £1 is regarded as disposable income. It is therefore submitted that so far as the Act of 1949 is concerned the fact that an income is not assignable does not prevent it from being regarded as disposable income. The meaning of the word " income " has a relation to the particular statute in which it is used (*Longsdon* v. *Ministry of Pensions*[22]), and in the present case the Act of 1949 defines that which is disposable.

[21] [1956] 1 W.L.R. 128; [1956] 1 All E.R. 425.

[22] [1956] 1 Q.B. 587; [1956] 2 W.L.R. 176; [1956] 1 All E.R. 83.

Alimony pending suit is clearly something which comes in to the wife and is therefore her income. In *Ex parte Bremner, Bremner* v. *Bremner* [23] it was held that a solicitor could exercise his lien in respect of alimony pending suit which, by the wife's consent, had been paid to him. The requirement to pay contributions does not amount to a charge, for in *Davies* v. *Littlejohn* [24] it was held that an obligation to make future payments was not a charge. In *Hood Barrs* v. *Heriot* [25] it was held that, even if a married woman's property was subject to express restraint, any particular instalment paid could be garnisheed. In other words, income, the taking of which by third parties is barred while in anticipation, becomes disposable when it is in the hands of the receipient. [Reference was made to the proviso to section 1 of the Married Women's Property Act, 1893.]

Money received by a married woman under an order for alimony pending suit, once the order is made and the amount is received, is income which she is fully entitled to spend as she sees fit, for instance, under a contract for sending her child to school, even though she can only meet future obligations under the contract out of her alimony, and the same consideration applies to contributions which she agrees to pay under a civil aid certificate.

It was said that if alimony pending suit is disposable income, the result might be that a wife receiving alimony might be totally excluded from the benefit of the legal aid scheme. It is submitted that there is no reason why a registrar when granting alimony should not have regard to the likelihood of contributions being required by the National Assistance Board. If, however, the amount of alimony granted should exceed the limit above which a person cannot receive legal aid, the consequence that the wives of rich men should not have the benefit of legal aid is not to be regarded as deterrent.

What was done in *Thorogood* v. *Thorogood* [26] was not consistent with the interpretation of the regulations which has been put forward in this argument. That case was not wrongly decided but it can be distinguished from the present case.

J. B. Latey and *B. M. Anns* for the Law Society. The Law Society is interested in the decision in the present matter, not as a body concerned with the determination of resources but from the point of view of the general administration of the legal aid scheme with which it is charged under section 8 of the Act of 1949. With regard to the question of an order against a husband to pay security for his wife's costs and its bearing on the present matter, the practice is that alimony pending suit is ignored in assessing security so far as the wife's means are concerned.

---

[23] (1886) L.R. 1 P. & D. 254.

[24] (1923) 34 C.L.R. 174.

[25] [1896] A.C. 174.

[26] The Times, Oct. 20, 1955.

[LORD MERRIMAN P. Will the presence of security in court absolve the wife from paying contributions?]

No. That is a personal debt. It is found in practice that an unsuccessful wife does not by any means always get her costs up to security. If an order is made for the wife's costs up to security or part of it, the legal aid fund will satisfy itself out of security and the wife may get her contribution or part of it back.

In *Williams* v. *Williams*,[27] in which a wife was receiving payments under a deed and the husband argued that she should have no security, it was said that if alimony pending suit is given with one hand it must not be taken away with the other. In *Allen* v. *Allen*[28] it was held that security had properly been ordered although the wife had an income of £780, since to make her liable for costs would be to disturb the order for alimony. It is submitted that alimony pending suit is disposable income and that it is not "the subject-matter of the dispute." As to *Thorogood* v. *Thorogood*,[29] there is a fundamental distinction between proceedings for alimony pending suit and an appeal against an order for maintenance, and what was said with regard to that by counsel for the board is adopted for the purpose of this argument. It would be difficult to suggest that maintenance under an order made by justices was not a subject-matter of the dispute in an appeal against the order. As to orders under section 23 of the Matrimonial Causes Act, 1950, it is submitted that an interim order stands in the same position with regard to the matter at present under consideration as alimony pending suit, while a final order under section 23 would be analogous to a justices' order and, if appealed, might become the subject-matter of that dispute.

"The subject-matter of the dispute" in the context of the Act and of the Legal Aid (Assessment of Resources) Regulations, 1950, must be something existing in actual monetary form at the time of the determination of the applicant's resources by the board, which is in jeopardy or at stake and the destination of which is decided by the proceedings. If this be the right test—and the words "the subject-matter of the dispute" have been nowhere interpreted except in *Thorogood* v. *Thorogood*[30]—then alimony pending suit does not fall within it and is not at any stage "the

---

[27] [1929] P. 114, 117; 45 T.L.R. 157.

[28] [1894] P. 134; 10 T.L.R. 161.

[29] The Times, Oct. 20, 1955.

[30] Ibid.

"subject-matter of the dispute." It is submitted that what the legislature had in mind was "the subject-matter of the dispute" in the context of resources. To say that in that context the words include every subject-matter would not be reasonable; for example, the words would not envisage proceedings for custody under the Guardianship of Infants Acts. If one considers the situation before alimony pending suit is granted, all that exists is a right to claim which may or may not be successful. There is no resource of which the wife is in receipt and, therefore, nothing to be exempted as "the subject-matter of the dispute."

[Lord Merriman P. Suppose that a wife applies for a civil aid certificate to pursue a claim for alimony pending suit and correspondence is produced which shows that there is no dispute as to her right and a tentative agreement as to the amount. Is the board entitled to regard that amount as disposable income?]

There is a provision which entitles the board to take into consideration any income which is reasonably likely to accrue, and an applicant is bound to inform the board of any increase in income actually received. Until a resource is in existence it is not capable of being assessed or regarded as part of a disposable income.

The Legal Aid (Assessment of Resources) Regulations, 1950, reg. 3, gives some indication upon the lines contended for. When the court actually makes an order for alimony pending suit this brings about a change of circumstances on the part of the wife inasmuch as she becomes entitled to a new source of income as to which there is no dispute.

As to the argument that the view put forward by the board and the Law Society is likely to cause hardship to a wife whose sole income consists of her alimony pending suit, the registrar fixes alimony pending suit at what is fair and reasonable, and he is entitled to take into account the fact that the wife intends to apply for legal aid and that she may have to make contributions. On another view the registrar fixes a reasonable amount and it is then left to the wife to spend it as she wishes. The legal aid and advice scheme was not intended to enable a person, having an ample allowance to live on, to litigate free of all cost. This is clear from the categories of disposable income which are wholly or partly to be disregarded and which show that it is contemplated that a person is to be expected to contribute to the legal aid fund if they have any income which is above the level of bare subsistence. The last thing Parliament desired was to encourage people to be litigious.

Section 3 of the Act of 1949 lays down and limits the amount which a wife receiving alimony pending suit will be required to contribute if such alimony be regarded as disposable income, and section 4 (1) refers to disregards and allowances upon disposable income and capital, and the specific allowances are set out in Part I of the First Schedule of the Legal Aid (Assessment of Resources) Regulations, 1950, rr. 2–7. It is, therefore, incorrect to assume that a wife who is required to make contributions as a term of obtaining a legal aid certificate will be left destitute. It might well be that a wife who is in receipt of alimony pending suit at a rate of considerably more than £3 a week will nevertheless be making a nil contribution. To accept the submissions of counsel for the wife would mean that a wife, who is receiving alimony pending suit at a rate of £2,000 a year less tax, assuming that she has no other income or capital, will be entitled to legal aid with a nil contribution, whereas a wife who is earning £700 to £750 a year would not be entitled to legal aid at all. Such an anomalous result is unjust and cannot have been intended by the legislature. The preamble of the Act states that its purpose is "to make legal aid and advice . . . more readily available for "persons of small or moderate means. . . ." It would be a very artificial interpretation to say that a wife who receives alimony at a rate of £2,000 per annum less tax could be described as a person of small or moderate means. That alimony pending suit is of very temporary duration is a consideration which does not affect the argument, for section 12 (3) (*d*) of the Act enables the Lord Chancellor to make regulations to deal with the situation arising when a legally aided person experiences a change of circumstances, and regulation 8 (1) (*d*) of the Legal Aid (General) Regulations, 1950, entitles the board to make a redetermination of disposable income or capital. [Reference was also made to regulation 8 (5) of the same regulations, condition 6 of the Terms and Conditions of the form of Acceptance of Offer of Civil Aid Certificate, regulation 11 of the same regulations and regulation 10 of the Legal Aid (Assessment of Resources) Regulations, 1950.]

As to the argument based on regulation 16 (8) of the Legal Aid (General) Regulations, 1950, as amended, it is submitted that the requiring of contributions out of disposable income is a very different thing from the charging of property recovered or preserved. The most a person can be asked to contribute out of disposable income is £132, whereas as to the charge there may be a very heavy short-fall such as would result in the whole of a wife's maintenance being charged to the fund for years; such a situation was plainly undesirable and would explain the introduction of regulation 16 (8).

J. E. S. Simon Q.C. in reply. With regard to the argument for the board that alimony pending suit is capable of being the subject-matter of a dispute but that, if the amount is determined before computation is made, it is not " the subject-matter of the " dispute," and that if alimony is ordered after that date it can be taken into account as disposable income on a reassessment, it is submitted: (1) An application for a certificate is not the same as a formal acceptance. Section 4 (3) of the Act was enacted for the protection of the applicant and if the regulations cut it down they are ultra vires. The vital moment at which it is to be decided whether a certain resource is a subject-matter of the dispute is when the certificate is applied for. That is the moment to which the board is directed to look by the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2.

(2) As to the second limb of the argument, dealing with reassessment, when an order has been made even after the certificate has been applied for and the dispute has thereby ceased (which was the view also adopted by counsel for the Law Society), the subject-matter of the dispute is still as defined in regulation 2. If alimony pending suit has to be disregarded at the moment of an application for a certificate it must still be disregarded at the moment of reassessment, for it is still the same subject-matter.

[LORD MERRIMAN P. What has been said on this point is that alimony has ceased to be the subject-matter of the dispute.]

That argument fails because the dispute is subject to the statutory rider that its existence is to be determined once and for all at a certain moment of time. The situation at the date of the application can never be altered in the same proceedings. There is, moreover, this reinforcement to the plain words of the regulation, that once an asset is paid over it becomes liable to a charge and, therefore, in that sense it could not be considered as a source of income until the size of the charge is known. By reason of regulation 16 (8) of the Legal Aid (General) Regulations, 1950, as amended, this consideration does not apply to maintenance and alimony but it is of aid as to the general construction of the regulations. Disposable income and the charge on property recovered or preserved under section 3 (4) of the Act are mutually inconsistent and exclusive.

(3) With regard to the argument on the assignability of alimony, *In re Landau, Ex parte Trustee*[31] was a case which

---

[31] [1934] Ch. 549.

turned merely on the construction of "income" in the Bankruptcy Act, 1914. [*Hood Barrs* v. *Heriot*[32] was also referred to.] The distinction between those cases and the present is that alimony pending suit is always variable. Payments restrained from anticipation are further to be distinguished from alimony in that the latter is always under the control of the courts. *J. Walls Ltd.* v. *Legge*[33] and *Paquine* v. *Snary*[34] show the limits beyond which the court will not go in giving a right to a wife's creditor as to moneys intended for her support. It is not submitted that the requiring of contributions amounts to a formal charge, but that it is equally objectionable because it amounts to the taking by the Law Society of money intended for the wife's maintenance for her costs.

It was also argued for the board that once alimony pending suit is ascertained or paid it is no concern of anybody how the wife spends it. The answer to that is contained in *Williams* v. *Williams*[35] and *Allen* v. *Allen*,[36] which show that the court will not countenance the use of a wife's alimony pending suit for the payment of costs.

Rodger Winn in answer to the point as to the time at which it is to be decided whether a resource is a subject-matter of the dispute. As to the time when it is to be decided what is the subject-matter of the dispute, the Act operates to prohibit the taking into account of certain matters at the moment when the taking into account is being performed. The prohibition is against the board taking into account "the subject-matter of the dispute" when computing the assisted person's disposable income. They do not make that computation on the date of the application, but they must look to see whether there is a dispute in respect of which application has formerly been made for a certificate. Regulation 2 applies to the point of time at which the board makes the computation and that regulation is properly to be read with certain expansions: "The National Assistance Board are prohibited when computing [a fortnight after the application] the "wife's disposable income from including the value of any "subject-matter of any existing or surviving dispute, in respect "of which application has been made in the same proceedings "for a certificate." The present tense is used in the regulation and it must, therefore, refer to an existing or surviving dispute. If not, then the meaning is past, present or future dispute. It is submitted that the regulation takes its force from section 4 (3), which refers to "a person seeking or receiving legal aid," and is in no way limited to the moment of the application; for the purposes of both regulation 2 and regulation 10 of the Legal Aid (Assessment of Resources) Regulations, 1950, what the board has to have regard to is the situation existing when the computation or redetermination takes place. If the argument of counsel for the wife be upheld this would explode the legal aid scheme, for all that then need be done to avoid the payment of contributions is to apply for a civil aid certificate before any possibility of a settlement has arisen.

---

[32] [1896] A.C. 174, 177–181.
[33] [1923] 2 K.B. 240.
[34] [1909] 1 K.B. 688.
[35] [1929] P. 114.
[36] [1894] P. 134.

Section 4 (3) of the Act must be taken as applying to the particular matter referred to therein, that is, to the moment of computation of resources, but the date of the application is, nevertheless, relevant. The narrow difference between the arguments is that counsel for the wife said that if there was in fact a certificate issued in respect of a dispute it is irrelevant that the dispute has ceased. It is submitted that the dispute must be one which can be excluded because it exists. A subject-matter cannot be excluded unless it is capable of being included.

J. B. Latey in answer to the point raised in counsel for the wife's reply. It has been submitted throughout that alimony pending suit before it has been ordered cannot be a subject-matter. The proper meaning of subject-matter in the context of the Legal Aid (Assessment of Resources) Regulations, 1950, is that it must be in existence. In *Thorogood* v. *Thorogood*[37] the justices' order was "the subject-matter of the dispute"; the maintenance under the order was a resource which the wife had until such time as, on appeal, it should be held that she was not entitled to it. In the present case, at the time when the matter comes before the National Assistance Board, the only thing the wife has is the right to put a claim for alimony pending suit before the court. The words of regulation 2 "the value of the subject-matter of the "dispute" are, therefore, meaningless in the present connexion, and it would follow that "the subject-matter of the dispute" must be a resource available when the application is made. Where she makes her application after alimony has been ordered there is no dispute any more than if she were receiving money under a deed or under a maintenance order previously made.

[LORD MERRIMAN P. Why should the National Assistance Board not assess a potential asset?]

---

[37] The Times, Oct. 20, 1955.

An applicant cannot be asked to contribute out of a bare right as to which the board is quite unable to prognosticate. Alimony is not akin to an interest which can be evaluated on an actuarial basis. The board could only take some potential earning capacity into account if it seemed that otherwise there might be a fraud. The true interpretation of the regulations requires the exclusion of matters in posse not qua subject-matter of the dispute but because they do not exist qua resources.

J. E. S. Simon Q.C. in further reply. As to the construction of regulation 2, both counsel for the board and for the Law Society said that the regulation must be read with the word "existing" or "surviving" before the word "dispute." The words of the regulation must be read in their ordinary meaning, which is that one looks at the application to define the dispute. The moment of the application was chosen because that is the moment upon which the information is given on which the computation is made. Regulation 2 must be read in its ordinary sense without the interpolation of "existing." If the draftsman had wished to say what counsel for the board and the Law Society contend, he could have used some phrase such as "an existing monetary resource which "is in dispute" or "in respect of which a dispute survives."

Neither counsel for the board nor for the Law Society have answered the challenge as to where one draws the line between the situation in *Thorogood* v. *Thorogood*[38] and alimony pending suit, nor have they said where proceedings under section 23 of the Act of 1950 stand. Counsel for the board would be bound to say, on his submissions, that periodical payments under section 23 were the subject-matter of a dispute. It is submitted that the construction contended for by counsel for the board and counsel for the Law Society both lead to injustice and absurdity and that it must, therefore, be rejected.

Cur. adv. vult.

LORD MERRIMAN P. read the following judgment: As is apparent from the form of the question for determination, the plaintiff (hereinafter referred to as the wife) is the respondent to a petition for divorce, presented by her husband, Frederick Kraupl Taylor, on March 11, 1955. On May 16, 1955, an emergency certificate, under regulation 10 of the Legal Aid (General) Regulations, 1950, as amended, was issued to the wife to defend her husband's petition, and to present a cross-petition. This certificate was expressed, as prescribed by clause (9) of that

---

[38] The Times, Oct. 20, 1955.

1956

TAYLOR
(FORMERLY
KRAUPL)
v.
NATIONAL
ASSISTANCE
BOARD.

Lord
Merriman P.

regulation, to remain in force for a period of six weeks from its date, or such other period, not exceeding three months, as the local committee might allow, unless previously revoked or replaced by a civil aid certificate. The same clause provides that, unless within that period a certificate is issued in respect of the same proceedings, the emergency certificate is to be deemed to have been revoked. The emergency certificate was filed on May 19, 1955, and on the same day the wife's solicitors entered a general appearance on her behalf, and gave notice of application for alimony pending suit.

Applications for civil aid certificates are governed by regulation 3 of the Legal Aid (General) Regulations, 1950, as amended, hereinafter referred to as "General Regulation No. 3." By clause (2) of that regulation every application is to be "made in "writing, on a form approved by The Law Society . . . and shall "be lodged with the secretary of the Local Committee." By clause (3) "Every application shall contain such information and "shall be accompanied by such documents as may be requisite "to enable—(a) a Local Committee to determine—(i) the nature "of the proceedings in relation to which legal aid is sought and "the circumstances in which legal aid is required; and (ii) the "question whether it is reasonable that a certificate should be "granted; and (b) the Board to determine the disposable "income and disposable capital of the applicant, for which "purpose the applicant shall undertake to furnish the Board with "such further information as they may require in the circumstances of the case."

Accordingly, on June 14, 1955, the wife applied for a civil aid certificate on the prescribed form. In paragraph 8 of Part I she stated that the purpose of the certificate was (a) to defend the proceedings, (b) to resist the claim made in the petition for custody, (c) to cross-petition for divorce, (d) to claim maintenance from her husband for herself and the child of the marriage, and (e) to claim the custody of the child.

Incidentally, it is within my official knowledge that, for the purpose of legal aid taxation, in the Principal Divorce Registry, the invariable practice, whether ancillary reliefs are specifically mentioned or not, is to treat a wife's civil aid certificate to conduct a divorce suit as covering the final ascertainment of, and service of the order for, maintenance, even though the proceedings in connexion with maintenance may continue after the decree in the suit has been made absolute. This practice, which I understand resulted from discussions with the Law Society at the outset, covers all proceedings for alimony pending suit. On the other hand, subsequent applications to vary or discharge an order for maintenance are held to require a fresh legal aid certificate.

Thus, the fact that the claim for maintenance is mentioned expressly in the wife's application for a certificate merely emphasizes the point that it will be a subject of the dispute.

In Part IV of the prescribed form the wife gave certain particulars of her husband's means. But by regulation 4 (1) and (2) (i) and (ii) of the Legal Aid (Assessment of Resources) Regulations, 1950 (hereinafter referred to as the "Resources "Regulations"), her husband's resources are not to be treated, in computing a wife's rate of income, as her resources when "the "proceedings in respect of which the application for a certificate "is made are a matrimonial cause . . ."

The wife further stated that she had no present annual income, either from employment or from any other source, except an allowance of £4 a week which she was receiving from her husband and 8s. weekly family allowance. Finally, in answer to the question about savings, capital or house property, she said that she had only a post office savings account, with a credit of approximately 19s.

Thus, in Part I, paragraph 8, of her application the wife gave the requisite information to enable the local committee to determine the nature of the proceedings in relation to which legal aid was sought, namely, a matrimonial cause, in which her application for alimony pending suit had already become a subject-matter of the dispute.

Then in Part IV of the form the wife gave the information about her resources, requisite to enable the board to determine her disposable income. The fact that, in answer to the question in paragraph 9—"Do you expect your income to remain about "the same during the next 12 months; if not, what difference "do you expect?"—she answered that she hoped her solicitors would obtain reasonable alimony, is, in my opinion, irrelevant. If, on a true construction of the Act and regulations, alimony pending suit is not liable to be included in her disposable income, the expression of her hope that an order for alimony would be obtained manifestly cannot make it so.

On June 24, 1955, the emergency certificate was extended for a further period of six weeks. On June 27, 1955, Mr. Registrar Forbes made an interim order for alimony pending suit, for the amount already mentioned in the originating summons. As appears from the correspondence, the previous allowance of £4 a week, mentioned in her application, ceased on July 1, 1955, and it has been common ground throughout the argument that the amount of the order represents the sole income of the wife at the material time.

On July 18, 1955, the wife received an offer of a civil aid certificate, on the basis that her disposable income had been assessed at £410 per annum, and her maximum contribution at £127, payable by an initial contribution of £10 11s. 8d. and 11 monthly instalments of the same amount.

On August 4, 1955, the wife's solicitors wrote, asking to be informed of the basis on which the assessment of disposable income had been made. They said that the only explanation which occurred to them was that the assessment had been based upon the order for alimony pending suit, and that if this was so they would be grateful if the fact could be confirmed, because they would then propose to make certain representations to the National Assistance Board. They pointed out that the wife could not possibly afford to pay the monthly instalments at the prescribed rate, and requested that the matter should be treated as one of importance and urgency.

In another letter of the same date her solicitors, in support of the contention that the wife could not pay the sum of £10 11s. 8d. on the date of acceptance of the civil aid certificate, or the monthly instalments at that rate thereafter, referred to the cessation of the weekly allowance on July 1, 1955, and stated that it would be some months before the wife could hope to receive her tax rebate, and that the first payment under the order for alimony pending suit was not due until August 12, 1955.

The point concerning the due date for the first payment under the order is that by Resources Regulation 1 (2) "the period of "computation" is defined as being the period of 12 months next ensuing from the date of application for a certificate, or such other period of 12 months as in the particular circumstances of any case the board may consider to be appropriate. No other period has been selected; on the contrary, the solicitors' letter evoked a reply from the board that a revised determination in the wife's legal aid application had been made, because the original assessment was based on the assumption that she would receive a full year's allowance from her husband during the period of computation, with which the calculation of her assessment was concerned; but that "as her income under the court order does "not start until August 12 this was incorrect, and the assessment "has been amended accordingly."

From the board's letter it is manifest that the computation of the wife's disposable income has been made solely upon the basis of the amount to be received by her as alimony pending suit under the order of the court, within the 12 months next ensuing from the date of her application for a civil aid certificate. Indeed, it has been admitted throughout that this is the fact and, as has already been stated, that the money so payable is her sole source of income.

On August 19, 1955, a fresh offer of a civil aid certificate on the basis of a maximum contribution of £107 was made.

The sequence of dates already mentioned might have raised an awkward question in connexion with the revocation of the emergency certificate, and the decision not to issue a civil aid certificate in respect of the proceedings to which the emergency certificate related, notice of which was given on August 16, 1955. There was the risk that, under General Regulation 12 (1), the wife might be deemed never to have been an assisted person in the proceedings to which the emergency certificate related, which, of course, included the order of June 27, 1955, for alimony; and because of the hiatus between the revocation of the emergency certificate on August 16, 1955, and the fresh offer of a civil aid certificate on August 19, 1955, based on the computation of £107, it might have been impossible to relate back any certificate granted thereafter to the date of the issue of the emergency certificate, and so to pick up the wife's application of June 14, 1955.

It is true that Mr. Winn, for the National Assistance Board, made it clear that he did not wish to take advantage of any technical slip, and was using the dates in this context as an illustration of his proposition that, in a given case, a particular subject-matter might cease to be the subject-matter of dispute, notwithstanding that the main dispute, to which the dispute in question was subsidiary or ancillary, still continued.

It would indeed have been unfortunate if the court had been obliged to decide this question on the basis that the current offer of a civil aid certificate on the revised computation of disposable income could not in any case relate back to cover the order for the alimony pending suit, although the amount ordered was in fact taken into account as the basis of the computation. Happily, however, it is unnecessary to allude to the matter further. At the conclusion of the argument Mr. Latey, for the Law Society, on the instructions, I understand, both of the board and of the Law Society, stated that the application for a civil aid certificate, dated June 14, 1955, is, for the purposes of this case, to be deemed to have been continuously effective up to date. Mr. Simon, for the wife, expressed himself fully satisfied by this clarification of the issue. In my opinion this was a very proper concession, and is in accordance with the reality of the matter, leaving aside all purely technical considerations.

At the outset Mr. Winn took the preliminary point that the regulations provide that the board's computation of disposable income of an applicant is to be final, and although he did not dispute that the finality of the computation can be challenged if it is shown to be contrary to the statute and the regulations made thereunder, he submitted that the challenge should be made by certiorari, and not by an originating summons under R.S.C., Ord. 54A. He relied on the decision of Farwell J. in *In re Carnarvon Harbour Acts, 1793–1903, Thomas* v. *Attorney-General.*[1] But in that case no particular exercise of any power under the Acts was in question. Farwell J. regarded it[2] as a case of the trustees of a public undertaking faced with a question of construction of their own Act, or their own Act in combination with other Acts, coming to the court, making the Attorney-General a party, and demanding a decision upon a question of doubt which had not actually arisen. Farwell J. pointed out[3] that it is in each case a question of discretion whether the court ought to make a declaratory order, and thought that in the case described the court ought not to exercise its discretion to make such an order.

It is to be observed that by the express terms of R.S.C., Ord. 54A, r. 4, the court or judge shall not be bound to determine any such question of construction if, in his or their opinion, it ought not to be determined on an originating summons. The present case, however, is plainly not a case in which "no particular exercise of any power" is being called in question or in which the question of doubt has not actually arisen. If the applicant be right in her contention, she has been adversely affected by the wrongful imposition on the offer of a civil aid certificate of the obligation to make a monetary contribution, computed in a manner contrary to the true construction of the relevant statute and regulations.

Moreover, in *Barnard* v. *National Dock Labour Board*[4] Denning L.J. said[5]: ". . . I am sure that in the vast majority of

---

[1] [1937] Ch. 72; [1936] 2 All E.R. 1325.

[2] [1937] Ch. 72, 77–78.

[3] Ibid. 80.

[4] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113.

[5] [1953] 2 Q.B. 41.

" cases the courts will not seek to interfere with the decisions of " statutory tribunals; but that there is power to do so, not only " by certiorari, but also by way of declaration, I do not doubt. " I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon " itself; and the court should not, I think, tie its hands in this " matter of statutory tribunals. It is axiomatic that when a " statutory tribunal sits to administer justice, it must act in " accordance with the law. Parliament clearly so intended. If " the tribunal does not observe the law, what is to be done? The " remedy by certiorari is hedged round by limitations and may " not be available. Why then should not the court intervene by " declaration and injunction? If it cannot so intervene, it would " mean that the tribunal could disregard the law, which is a " thing no one can do in this country."

Though it would be wrong to suggest that the point was abandoned, I did not receive the impression that it was pressed with much fervour or confidence. Indeed, Mr. Winn joined the other counsel in the case in expressing the hope that I would determine the question.

This is a consideration to which, on the authority of Lord Evershed M.R. in *Bagettes Ltd.* v. *G. P. Estates*,[6] I am entitled to pay attention.

For these reasons I overrule the objection.

Before proceeding further I must mention one other matter. It appears that the only authority dealing with the construction of the words " subject-matter of the dispute " is *Thorogood* v. *Thorogood*,[7] a case in a Divisional Court of this Division (consisting of Collingwood J. and myself), heard on October 19, 1955. This was an appeal by a husband from the decision of the justices of the North Aylesford Petty Sessional Division of Kent, sitting at Chatham, on his complaint to reduce the amount of an order in favour of his wife from the maximum amount of £5 a week, with the addition of the maximum sum of 30s. in respect of a child, of whom she had been given the custody. The order had in 1954 been increased to those figures from the original amounts of £2 and 10s. respectively (which were the maximum amounts prevailing at the time when the order was first made in 1943). The ground of the complaint was that, since the 1954 order, the husband's means had decreased. The justices had decided that there was no sufficient change to justify a revision of the order.

---

[6] [1956] Ch. 290; [1956] 1 All E.R. 729.

[7] The Times, Oct. 20, 1955.

The wife had been granted a civil aid certificate to resist the appeal, and her disposable income had been computed at £83. It was quite plain, from the figures under discussion, that the amount computed as the disposable income of the wife could not have been arrived at without taking into account the amount of the order, and I am reported as having said: " I am sure, and I " have verified my references, that legal aid committees are doing " that which the Act of Parliament expressly forbids them to do, " namely, taking into account in assessing the income the actual " subject of the litigation, namely, the amount of the order; and " that is utterly wrong."

If those observations were ill-founded and govern the present case, I ought not to deal with this application, and I made it clear that I should decline to do so in those circumstances. However, I was assured categorically, both by Mr. Winn and Mr. Latey, that my observations were perfectly correct in connexion with that particular case. Seeing that the sole question was whether the amount of the order should be reduced, it is difficult to see how that amount could well be anything else than " the subject-" matter of the dispute." It was conceded by both counsel that this was manifestly so, and that one of the issues in this application was to establish a distinction between the two cases.

In one branch of his argument Mr. Simon laid great stress on the nature of alimony, and the principle that it is incapable of assignment, which is illustrated, for example, by the observations of Scrutton L.J. in *J. Walls Ltd.* v. *Legge.*[8] See also Younger L.J. in the same case[9] and the very strong observations of Vaughan-Williams L.J. in *Paquine* v. *Snary,*[10] in which it was held that the court has no jurisdiction, on the application of a judgment creditor of a married woman who has obtained a separation order from her husband under the Summary Jurisdiction (Married Women) Act, 1895, to appoint a receiver by way of equitable execution of a weekly sum ordered by the court of summary jurisdiction to be paid by the husband to his wife for her maintenance.

At the beginning of his judgment Vaughan-Williams L.J. said[11]: " One feature about the case seems to me to be conclu-" sive, which is that this weekly sum, which was ordered by the " magistrate under section 5 of the Act of 1895 to be paid to the " defendant by her husband, is not assignable by the defendant

---

[8] [1923] 2 K.B. 240, 244–245.

[9] Ibid. 246.

[10] [1909] 1 K.B. 688; 25 T.L.R. 212.

[11] [1909] 1 K.B. 690.

" and is in law inalienable. It is plain that equitable execution " cannot properly be granted in order to enable a judgment " creditor to seize money so paid, when the payments are admitted to be inalienable."

He added later that [12] " . . . it obviously could not have been " the intention of the legislature that a wife, though continuing to be supported by her husband, should be placed in " such a position that the money intended by the statute for her " support should be taken by her judgment creditors and applied " to payment of her debts, which clearly may not be in any sense " for her support." See also the judgment of Cotton L.J. in *In re Robinson.*[13]

On the other hand, Mr. Winn relied on the decision of the Court of Appeal in *In re Landau, Ex parte Trustee,*[14] that maintenance ordered by the divorce court to be paid to a bankrupt wife, during the joint lives of herself and her husband, was " income " within the meaning of section 51 (2) of the Bankruptcy Act, 1914: see particularly the judgment of Lord Hanworth M.R.,[15] where he relied on the observations of Lord Sumner in *Hollinshead* v. *Hazleton,*[16] in relation to payments made for the purpose of enabling a certain office of state to be maintained, or for retaining the future services of officers, which have the same characteristic of inalienability at common law.

Mr. Winn relied also on the observations of Lord Herschell in *Hood Barrs* v. *Heriot* [17] on the kindred subject of property to which a married woman is entitled for her separate use without power of anticipation. Lord Herschell drew [18] a clear distinction between being prevented by the restraint from having the dominion over the money until it becomes due, and her disposing of it as she pleases after it has become due and payable.

Correspondingly, it is suggested that here there is nothing to prevent the wife spending the amount of the sums due monthly under the order as she chooses, and she is not under any obligation to use them exclusively for her support. If she chooses, so it is argued, to spend the money when it becomes due on a visit to the theatre or towards the cost of her litigation, that is her affair, and the mere accident that, because in this particular case these payments represent her sole source of income, she is in fact compelled to pay her contributions out of the alimony does not affect the principle, and does not constitute a charge upon, or alienation of the amount of alimony due and payable under the order. See also *In re Tennant's Application.*[19]

---

[12] [1909] 1 K.B. 690.

[13] (1884) 27 Ch.D. 160, 163–164.

[14] [1934] Ch. 549; 50 T.L.R. 403.

[15] [1934] Ch. 555–556.

[16] [1916] 1 A.C. 428, 463; 32 T.L.R. 177.

[17] [1896] A.C. 174, 176.

[18] Ibid. 178, 179.

I will revert to this point later.

Before referring to the rival contentions, it will be useful to consider the general scheme of the Act and regulations.

As the relevant words of the preamble to the Legal Aid and Advice Act, 1949, show, it is an Act to make legal aid in England and Wales more readily available for persons of small or moderate means, to enable the cost of legal aid for such persons to be defrayed wholly or partly out of moneys provided by Parliament, and for purposes connected therewith. Effect is given to the word "partly" by provisions designed to ensure that assisted persons pay such contribution towards the legal aid as their means allow.

Provision for contribution by the assisted person is made at two separate and distinct stages: namely, in the first instance by contributions made out of his disposable income, or disposable capital, as the case may be—(no question of disposable capital arises in this case; that aspect of the matter can therefore be ignored)—and, secondly, by imposing a charge, by virtue of section 3 (4) of the Act on property recovered or preserved in the proceedings in question, in respect of any sums remaining unpaid on account of a person's contribution to the legal aid fund, and of the amount by which the total contribution is less than the net liability of the fund on his account—which, in the argument, was conveniently described as the "short-fall" of contributions.

First, as regards contributions out of disposable income. It is the duty of the board to compute the disposable income for the relevant 12 months' period of computation—already referred to—with certain prescribed deductions and allowances, more particularly described in Part I of the First Schedule of the Resources Regulations, and to fix the maximum contribution.

It then becomes the duty of the local committee, acting on behalf of the Law Society, to whom is entrusted the general administration of the scheme, to fix the actual amount of the applicant's contribution, and the instalments, if any, by which it is to be paid. In certain circumstances, of which, assuming the wife's disposable income to have been computed on the right principle, this case would be an example, the local committee have no option but to fix the contribution at the maximum determined by the board. Moreover, the applicant is obliged to reveal any increase in his resources above a specified amount occurring during the period of computation and provision is made for a fresh computation accordingly: see General Regulation 8 (1) (*d*) and (2)–(5).

---

[19] [1956] 1 W.L.R. 128; [1956] 1 All E.R. 425.

Section 4 (3) of the Act provides that the regulations shall include provision for securing that the resources of a person seeking or receiving legal aid shall be treated as not including "the subject-matter of the dispute."

It will be necessary to consider more particularly the regulation designed to secure that end, and the interpretation of the words "the subject-matter of the dispute" in relation to the circumstances of this case.

But the contributions to be made out of disposable income are not the end of the applicant's liability to the legal aid fund, for, as has already been mentioned, property recovered or preserved is charged under section 3 (4) of the Act with any short-fall of contributions. This charge is made effective by providing that the solicitor alone can give an effective discharge for any payment in respect of that property, and imposing on the solicitor the obligation to pay the money to the Law Society who, putting it shortly, will reimburse the legal aid fund in respect of the short-fall, and will pay any balance to the assisted person.

In the nature of things, speaking generally, any property preserved or recovered will have been a subject-matter of the dispute, although, of course, it does not necessarily follow that the subject-matter of every dispute can be valued in terms of property, whether in the shape of money or otherwise. For example, in a divorce suit the overriding subject-matter of dispute is whether the matrimonial offence alleged is proved, and whether a decree of divorce shall follow. Manifestly, disputes of this kind are not capable of valuation in terms of money, either at the initial stage, when disposable income falls to be computed, or at the conclusion of the suit for the purpose of chargeability.

On the other hand, within the ambit of the main issue, subsidiary disputes in connexion with ancillary relief may arise which can be valued in terms of money. For example, maintenance for the wife at any stage, from alimony pending suit to

1956

TAYLOR (FORMERLY KRAUPL) v. NATIONAL ASSISTANCE BOARD.

Lord Merriman P.

what are described in the Matrimonial Causes Rules, 1950, as " a secured provision " or " variation of marriage settlements " may be the subject-matter of a dispute, albeit a dispute which is subsidiary to the main dispute, and which, unlike other ancillary disputes, such as those relating to the custody of, and access to, children, can have a money value.

Here I would observe that the board have very wide powers of computing the disposable income of an applicant. See, for example, Resources Regulation 9 (1) and paragraphs 5, 6, 7 and 9 of Part I of the First Schedule thereto. These powers, in my opinion, would be wide enough to enable the board to make their own computation of the amount of alimony pending suit likely to be received within the year, assuming, of course, that in any given case alimony is liable to inclusion in disposable income.

The regulation designed to ensure compliance with section 4 (3) of the Act is Resources Regulation 2, which reads as follows: " 2. In computing the rate of income or the amount of capital of " the person concerned there shall be excluded the value of the " subject-matter of the dispute in respect of which application " has been made for a certificate."

All counsel are agreed that it is implicit in this regulation that " the subject-matter of the dispute " must be one that can be valued in terms of money.

But the question whether a particular resource of an applicant for a certificate is to be included in, or excluded from, the computation of his disposable income for the relevant period because it is, or is not, a " subject-matter of the dispute " depends on determining the point of time to which those words relate.

Mr. Simon contends that, on the true construction of the regulations, the decisive moment is that at which the application for a civil aid certificate is made; namely, in this case, June 14, 1955; whereas Mr. Winn contends that it is the moment at which the board makes the computation of the disposable income; that is to say, either July 18, 1955, or August 19, 1955.

With the reservation that there might be something in the nature of an antecedent agreement or a former order, unconnected with the current dispute, which might show that no dispute could be in existence at the material time, Mr. Winn agreed with Mr. Simon that an application for alimony pending suit does raise a subject-matter of dispute.

Mr. Latey, however, submitted that the particular resource must exist in actual monetary form at the relevant date. Accordingly, he submitted that at the time of an application for alimony pending suit there is nothing more than the right to claim alimony, which may or may not succeed; and as he, like Mr. Winn, contends that at the moment of the making of an order the dispute ceases, the effect of Mr. Latey's contention is that an application for alimony pending suit can never be "the subject-matter of the dispute," because at the time of the application it is in posse, and does not exist in monetary form, while at the time of the order it is no longer in dispute.

There is nothing in Resources Regulation 2 itself to the effect that "the subject-matter of the dispute" must exist in actual monetary form. The question, therefore, seems to be whether any such qualification must be implied.

Mr. Latey's argument would apply to all applications for maintenance and, indeed, taken literally, would seem to prevent any chose in action from ever being the subject-matter of a dispute. I have no doubt that in this respect Mr. Simon and Mr. Winn are right, and that undetermined applications for maintenance, including alimony pending suit, can be the subject-matter of a dispute.

But, assuming this to be so, there remains the question, about which Mr. Winn and Mr. Latey are agreed, whether the determination of the value of the alimony by judicial decision makes it impossible to regard the amount ordered as being any longer "the subject-matter of the dispute," or, more precisely, to describe it as being "the value of the subject-matter of the "dispute."

Accordingly, if "the subject-matter of the dispute" ceased to exist on the making of the order of June 27, 1955, it is immaterial whether the date of the computation is that of the original computation of July 18, 1955, or the revised computation of August 19, 1955.

Whereas, if Mr. Simon is right, and the date of the application is the decisive date, the wife's claim for alimony then became, and remains, "the subject-matter of the dispute," in respect of which by her application for a certificate she sought legal aid, and of which the value was determined on the making of the order, and must, therefore, be excluded from the computation of disposable income.

1956

TAYLOR (FORMERLY KRAUPL) *v.* NATIONAL ASSISTANCE BOARD.

Lord Merriman P.

Mr. Winn submitted that Resources Regulation 2 should read as follows: "The National Assistance Board are prohibited when "computing" (in this instance a fortnight after the date of the application) "the wife's disposable income from including the "value of any subject-matter of any existing or surviving dispute, "in respect of which application has been made in the same "proceedings for a certificate."

No doubt this is a possible construction, but it raises the question whether there is any justification for inserting the condition that the dispute in question must exist, or survive, at the moment of computation.

Mr. Simon argued that the words "in respect of which "application has been made for a certificate" have more than the mere adjectival significance contended for by Mr. Winn. He argued that the making of the application is the cardinal point in the scheme for legal aid, since, as has already been seen, it is at that point that the applicant defines "the nature "of the proceedings" in relation to which legal aid is sought, for which, he submits, "the subject-matter of the dispute" is an apt synonym, and it is from that moment, save in exceptional circumstances, that the period of 12 months starts, within which the disposable income of the applicant is to be computed.

Even if the necessity for a fresh computation arises, the period for which the computation is to be made remains fixed from the start, and so, Mr. Simon submits, should the determination of the subject-matter of the dispute. He argues that whereas it is clear that on that cardinal date there was a dispute of which the subject-matter was the wife's right to, and the quantification of, alimony pending suit, anything recovered in that dispute has the quality of property recovered, and cannot thereby acquire the quality of disposable income; and he argues that it is irrelevant that maintenance in any of the forms recoverable in a matrimonial cause is expressly exempted by Resources Regulation 16 (8) from chargeability as property recovered.

The essential difference between disposable income or disposable capital on the one hand, and property recovered on the other, may be illustrated by the example of an application for a certificate to bring an ordinary civil action in which two claims for liquidated amounts are made. Both claims would be the subject-matter of the dispute, covered by the same civil aid certificate. But if judgment under R.S.C., Ord. 14, were obtained for one head of claim, while the action continued as to the other, the former would be property recovered, and would be chargeable as such in respect of any " short-fall " of contributions, but by contrast with some new resource acquired during the period of computation, but unconnected with the dispute, could not, it was submitted, be included retroactively as a resource in the computation of disposable income, or capital, as the case might be.

It is manifest that this distinction raises an important question of principle, which does not depend upon the peculiar exemption of maintenance from chargeability as property recovered. For, if that which was " the subject-matter of the dispute " at the date of the application for a certificate is recovered, and becomes chargeable as property recovered for the short-fall between the contributions and the costs, and, because the dispute has been determined, is also liable to be treated retroactively as disposable income, or disposable capital, and to be brought into the computation for contributions as such, this in effect would mean making the same " resource " liable to inclusion in each of the two distinct categories of an applicant's resources. I cannot believe that a construction of the regulations which would produce that result can be right.

In my opinion it is contrary to the general principles of the legal aid scheme that the fact that the dispute has ended in the recovery of the very thing which at the time of the application for a certificate was " the subject-matter of the dispute " should subject the value recovered to such a double liability. Yet this would be the result in this case but for the special exemption of any form of maintenance from chargeability as property recovered.

When an increase of resources is derived from the determination of the dispute, after the date of the application for a certificate, the appropriate means of ensuring that it attracts an additional contribution to the legal aid fund is, in my opinion, through the charge on property recovered, and the special exemption of this particular property from chargeability is irrelevant.

It may be useful, perhaps, to set out what has happened in this case in terms of General Regulation 3 (3), Resources Regulation 1 (2), and Resources Regulation 2 itself.

On June 14, 1955, the wife, being the person whose disposable income is to be computed for the 12 months next ensuing from that date, made an application for a civil aid certificate. As prescribed by General Regulation 3 (3), her application contained information requisite to enable the local committee to determine

(i) the nature of the proceedings in relation to which legal aid was sought; namely, to enable her to defend the husband's petition, to cross-petition, and, inter alia, to claim maintenance and alimony pending suit—in other words, "the various subject-"matters of the dispute," and, for my part, I can think of no words more apt to describe the matters in litigating which the wife sought to be assisted; and (ii) the reasonableness of granting a certificate—which I take to mean whether the information supplied disclosed at least a prima facie case; and, under General Regulation 3 (3) (*b*), her application contained information requisite to enable the board to determine the wife's disposable income for the period of 12 months from the date of the application.

On the information supplied, her disposable income could not very well be computed at anything but "nil," unless the board, under the wide powers to which reference has already been made, chose to estimate the amount likely to be received within the year in respect of alimony pending suit, the application for which was already pending. Assuming this course to be open to them, and to have been taken, it seems to me that it would have been impossible for the board to include, as disposable income, the figure so assessed, since at that time it would clearly have been "the subject-matter of the dispute."

In effect, therefore, the question is whether to speak of the value of the subject-matter of a dispute that has been determined is a contradiction in terms. In my opinion there is no such contradiction. Whether one speaks of the cause of action for assistance in litigating which the applicant seeks legal aid; or "the subject-matter of the dispute in respect of which applica-"tion has been made for a certificate" (Resources Regulation 2); or "the nature of the proceedings in relation to which legal aid "is sought" (General Regulation 3 (3) (*a*) (i)), the ascertainment of the value of the subject of dispute makes no change in the nature of the matter on which the value has been put. This remains constant throughout.

In relation to this case I think that Resources Regulation 2 should be read as follows: "Whenever the board compute the dis-"posable income of the applicant for a civil aid certificate for the "period of computation they are forbidden to include the value "of that which is disclosed in the application for a certificate as "the subject-matter of the dispute." This version does secure that within the wording of section 4 (3) of the Act the resources

1956

Taylor (formerly Kraupl) v. National Assistance Board.

Lord Merriman P.

of a person seeking or receiving legal aid shall be treated as not including "the subject-matter of the dispute." Moreover, the fact that, generally speaking, the beginning of the period of computation is fixed as being the date of the application, and that the question to be determined is the amount of the disposable income for the period of computation, and that from that computation is to be excluded "the subject-matter of the dispute," supports the suggestion that the date of the application is also the date for determining what is "the subject-matter of the dispute."

It is true, of course, that the original computation may be amended under General Regulation 8, but the computation still remains a computation for the same period of computation of 12 months, beginning with the date of the application.

In my opinion the interval of time, over which the applicant has no control, between her application for a certificate and the computation by the board, whether the delay is avoidable, or even arbitrary, or is unavoidable, should not affect the question of the inclusion or exclusion of a particular resource; and it should be immaterial whether the computation is made by estimation within the wide powers of the board in that behalf, or is postponed until the value is judicially determined.

Reverting, in conclusion, to Mr. Simon's argument, based upon the nature of alimony, it may very well be that the characteristic of inalienability which attaches to all forms of alimony may account for the peculiar exemption from chargeability contained in General Regulation 16 (8).

But although I appreciate that the individual circumstances of the wife may virtually compel her, under pain of the revocation of her certificate, to use the monthly payments of her alimony pending suit for the discharge of her obligation to make the contributions to which she has been assessed, because she has no other source of income out of which to make them, I am inclined to accept the contention that this circumstance cannot, in law, constitute a hypothecation or alienation of the amount of the alimony.

But as this case, in my opinion, falls to be decided on the point that "the subject-matter of the dispute" has been included in the computation of her disposable income, contrary to section 4 (3) of the Act and Resources Regulation 2, I prefer not to express a concluded opinion on the point, which in any case would merely be obiter dictum.

1956

TAYLOR (FORMERLY KRAUPL) *v.* NATIONAL ASSISTANCE BOARD.

For these reasons I pronounce in favour of the plaintiff wife, and make a declaration in her favour in the form set out in the application, to the effect that she is entitled not to have the amount of the alimony pending suit included in the computation of her disposable income for the purposes of her contribution to a legal aid certificate.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker; Solicitor, National Assistance Board; T. G. Lund, The Law Society.*

E. J.

END OF VOLUME AND OF PROBATE SERIES FOR 1956.

BIBL. LONDIN. UNIV.

UL 7 MAY 1957